

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1969

No. 1155

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UNITED STATES OF AMERICA,

*Appellant,*

—v.—

MILAN VUITCH

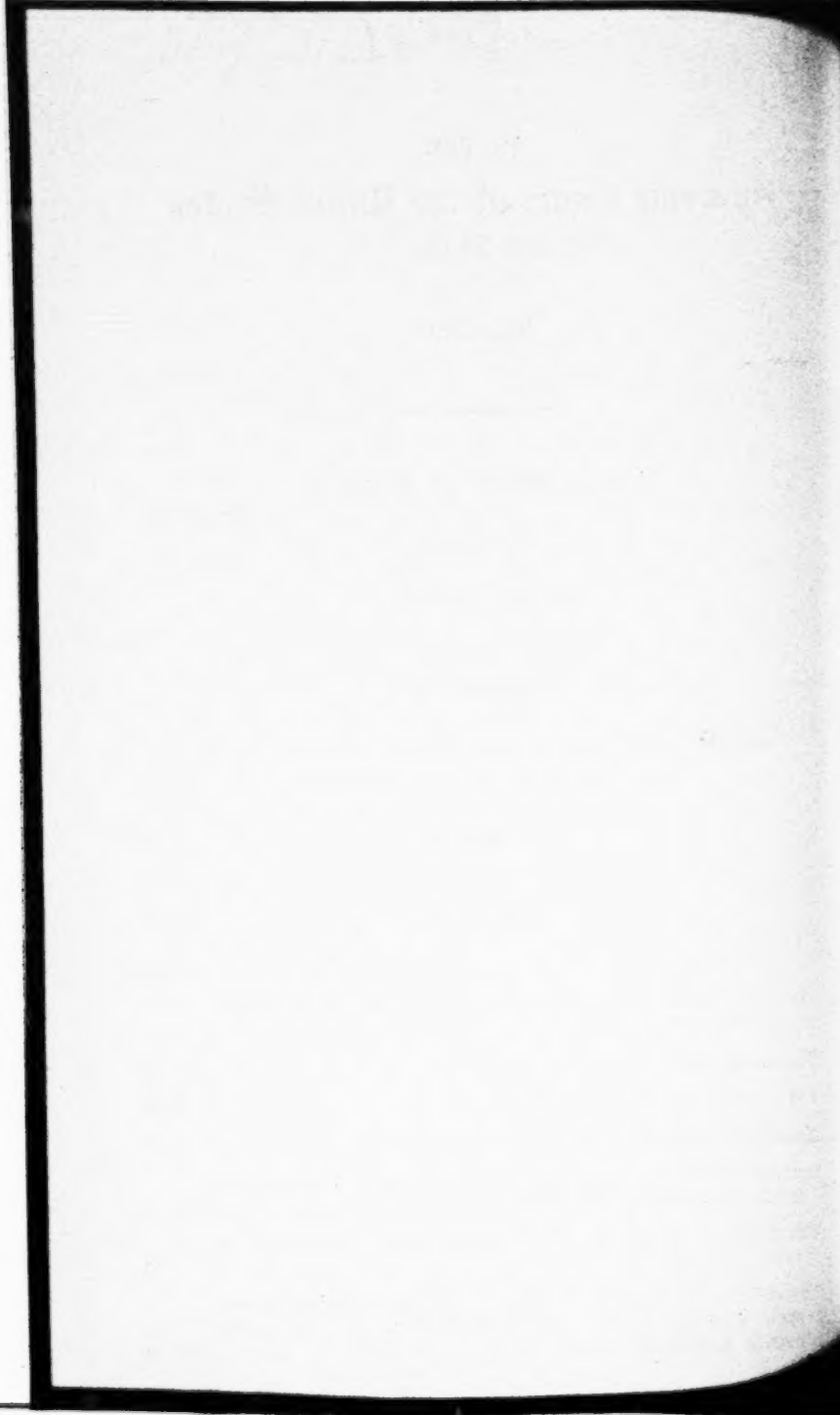
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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**RELEVANT DOCKET ENTRIES**

**The indictments dated July 15, 1968**

**Motion to dismiss the indictments dated October 14, 1969**

**Opinion and order granting the motion to dismiss indictments (November 10, 1969)**

**The Notice of Appeal to the Supreme Court (December 10, 1969)**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**HOLDING A CRIMINAL TERM**

**Grand Jury Sworn in on April 23, 1968**

**Criminal No. 1043-68**

**Grand Jury No: Original**

**Violation: 22 D. C. Code 201  
(Abortion; Attempted Abortion)**

**THE UNITED STATES OF AMERICA**

**v.**

**MILAN VUITCH**

**The Grand Jury charges:**

**FIRST COUNT:**

On or about February 1, 1968, within the District of Columbia, Milan Vuitch, by means of instruments, medicines, drugs and substances, a more particular description of which is unknown to the Grand Jury, did procure and produce an abortion and miscarriage of Inez M. Fradin, she being then and there pregnant.

**SECOND COUNT:**

On or about February 1, 1968, within the District of Columbia, Milan Vuitch, by means of instruments, medicines, drugs and substances, a more particular description of which is unknown to the Grand Jury, did attempt to procure and produce an abortion and miscarriage of Inez M. Fradin.

**Attorney of the United States  
in and for the District of  
Columbia**

**A TRUE BILL:**

**Foreman**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**HOLDING A CRIMINAL TERM**

**Grand Jury Sworn in on April 23, 1968**

**Criminal No. 1044-68**

**Grand Jury No: Original**

**Violation: 22 D. C. Code 201  
(Abortion; Attempted Abortion)**

**THE UNITED STATES OF AMERICA**

**v.**

**MILAN VUITCH, THELMA WILLIAMS**

**The Grand Jury charges:**

**FIRST COUNT:**

On or about May 1, 1968, within the District of Columbia, Milan Vuitch and Thelma Williams, by means of instruments, medicines, drugs and substances, a more particular description of which is unknown to the Grand Jury, did procure and produce an abortion and miscarriage of Nancy E. Russell, she being then and there pregnant.

**SECOND COUNT:**

On or about May 1, 1968, within the District of Columbia, Milan Vuitch and Thelma Williams, by means of instruments, medicines, drugs and substances, a more particular description of which is unknown to the Grand Jury, did attempt to procure and produce an abortion and miscarriage of Nancy E. Russell.

**Attorney of the United States  
in and for the District of  
Columbia**

**A TRUE BILL:**

**Foreman**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HOLDING A CRIMINAL TERM

Criminal No. 1044-68

[Received Oct. 15, 1:17 p.m., '69, United States  
Attorney, Washington, D. C.]

THE UNITED STATES OF AMERICA

v.

MILAN VUITCH, ET AL., DEFENDANTS

MOTION TO DISMISS INDICTMENT

Defendant Milan Vuitch, a licensed practitioner of medicine in the District of Columbia, moves to dismiss the indictment, and for grounds states:

1. The statute, 22 D.C. Code 201, under which the indictment is brought is unconstitutional on its face and as applied to him.

2. The language of the statute as applied to a physician is vague.

3. The statute interferes with the physician-patient relationship.

4. The statute unconstitutionally restricts the patient's right of privacy and freedom of choice.

5. And for other reasons to be argued at the hearing hereon.

/s/ JOSEPH SITNICK  
JOSEPH SITNICK  
Atty. for Defendant  
1511 K Street, N. W. #843  
Washington, D. C. 20005  
NAtional 8-3978

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Criminal Nos. 1043-68, 1044-68

UNITED STATES OF AMERICA

v.

MILAN VUITCH

Criminal No. 1587-69

UNITED STATES OF AMERICA

v.

SHIRLEY A. BOYD

MEMORANDUM OPINION

These cases involve motions to dismiss indictments for abortion brought under Title 22, Sec. 201, of the D.C. Code. Vuitch is a physician licensed in the District of Columbia; Boyd is a nurse's aide. There is no relation between the two except that each defendant has moved to dismiss the indictment on the ground that the District of Columbia abortion statute is unconstitutional. The elaborate briefs, replete with authorities and background materials, have been considered, including the brief amicus of the American Civil Liberties Union. The arguments having been completed today, the Court is prepared to rule from the bench because of the public urgency of the matter.

While there have been many prosecutions under this statute over the years, there are very few decisions interpreting it and none of recent vintage. Apart from the wording of the statute itself there is no significant legislative history giving any indication of the underlying congressional intent, either at the time of enactment or subsequent amendment. As far as can be ascertained, this is the first constitutional challenge of the statute and the issues presented in these motions have not been decided in this jurisdiction. The Court has taken judi-

cial notice of the materials cited in the briefs but they are of such common understanding that they need not be elaborated on here in any detail.

The statute in question was originally enacted as part of the District of Columbia Code of 1901 and thereafter re-enacted with only slight modification. It provides in pertinent part:

"Whoever . . . produces an abortion . . . on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned. . . ."

A felony penalty of from one to ten years is provided.

Basically the motions attack the statute for *vagueness*, allege that its practical operation denies equal protection to certain economic and other groups subject to its sanctions and assert a constitutional right of all women, regardless of their circumstances, to determine whether or not they shall bear a child. Constitutional doctrines of recent evolution are referred to by analogy to reinforce the motions.

The statute does not prohibit all abortions. An abortion is permitted where done "as necessary for the preservation of the mother's life and health" and "under the direction of a competent licensed practitioner of medicine." This two partite exception clearly points up a basic congressional concern with what may broadly be said to be medical factors. The Court has a duty to interpret the statute in a manner consistent with the apparent congressional intent. As the briefs and arguments have emphasized, there are still many health or medical problems created by the varying conditions under which abortions are performed. While there have been many advances in medical knowledge and techniques since 1901, there is nothing before the Court which establishes that abortions may be safely and hygienically performed at various stages of pregnancy except under medical direction. Indeed there is ample evidence, and the parties so assert, that infection and death still often attend clumsy, unskilled terminations of pregnancy performed by non-physicians.

Under these circumstances, it was and still is well within the police power of the Congress to outlaw abortions that are not performed under a "competent", that is, a qualified, licensed practitioner of medicine.

The true crux of the controversy here concerns the other part of the exception—"as necessary for the preservation of the mother's life or health." It is suggested that these words are not precise, that, as interpreted, they improperly limit the physician in carrying out his professional responsibilities, and that they interfere with a woman's right to avoid childbirth for any reason. The word "health" is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. While the law generally has been careful not to interfere with medical judgment of competent physicians in treatment of individual patients, the physician in this instance is placed in a particularly unconscionable position under the conflicting and inadequate interpretations of the D.C. abortion statute now prevailing. The Court of Appeals established by such early cases as *Peckham v. United States*, 96 U.S. App. D.C. 312 (1955), *cert. denied*, 350 U.S. 912, and *Williams v. United States*, 78 U.S. App. D.C. 147 (1943), that upon the Government establishing that a physician committed an abortion the burden shifted to the physician to justify his acts. In other words, he is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health. These holdings, which may well offend the Fifth Amendment of the Constitution, as interpreted in recent decisions such as *Leary*, 395 U.S. 6 (1969), and *Gainey*, 380 U.S. 63 (1965), also emphasize the lack of necessary precision in this criminal statute. The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word "health" should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court.

No body of medical knowledge delineates what degree of mental or physical health or combination of the two is required to make an abortion conducted by a competent physician legal or illegal under the Code. Other uncertainties in the phrase "as necessary for the preservation of the mother's life or health" are discussed and documented in *People v. Belous*, 80 Cal. Rep. 354 (1969), and need not be repeated here.

Thus the phrase under discussion will not withstand attack for it fails to give that certainty which due process of law considers essential in a criminal statute. Its many ambiguities are particularly subject to criticism for the statute unquestionably impinges to an appreciable extent on significant constitutional rights of individuals.

At common law abortion prior to quickening was not an offense. In fact, abortion did not become a statutory crime in the United States until about 1830. It has repeatedly been held, even under the D.C. statute, that the woman who aborts commits no offense. *Thompson v. United States*, 30 U.S. App. D.C. 352 (1908). There has been, moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy. *Griswold*, 381 U.S. 479 (1965), *Loving*, 388 U.S. 1 (1967). Matters have certainly reached a point where a sound, informed interest of the state must affirmatively appear before the state infringes unduly on such rights. The abortion debate covers a wide spectrum of considerations: moral, ethical, social, economic, legal, political and humanitarian, as well as medical. (See *Abortion*, Tietze & Lewit, *Scientific American*, January, 1969, Vol. 220, No. 1). But it does not appear to what extent Congress has weighed these matters in establishing abortion policy for the District of Columbia beyond an expression of a clear necessity of placing the matter in the hands of competent doctors.

The question is next presented whether the statute is severable, that is, whether it may be read as outlawing



abortions except when performed under the direction of a competent physician, eliminating only the preservation-of-life-or-health standard. Boyd, a non-physician, urges that because of the vagueness of the life-and-health phrase, the entire statute must fall. The Court concludes otherwise. The statute still protects a proper legislative and separate legislative objective if the one factor is stricken and the other allowed to remain. The Court is satisfied that the statute is severable (*United States v. Jackson*, 390 U.S. 570 (1968), *Stewart v. Washington*, 301 F.Supp. 610 (1969), and holds that Congress has constitutionally required that abortions be undertaken only under the direction of a competent physician. Title 2-102, 130 governing licensing of the healing arts is not sufficient to protect the congressional purpose of limiting abortions to competent physicians. Even if the Court accepts Boyd's claim to standing under liberal criteria of such cases as *Baker v. Carr*, 369 U.S. 186 (1962), and *Flast v. Cohen*, 392 U.S. 83 (1968), her challenge fails because the statute is severable.

Boyd's further contention that the statute discriminates against the poor and in its present operation denies medical help in city hospitals but is more liberally applied in some private hospitals has considerable support in the sketchy statistics and other data presented. The statute has received differing interpretations in the hospitals. In the light of the Court's ruling, however, there is no reason why the statute cannot henceforth be evenly applied throughout the city in a way which removes the principal basis for existing uncertainty and confusion. National and local policy provides free medical care for the poor. It is legally proper and indeed imperative that uniform medical abortion services be provided all segments of the population, the poor as well as the rich. Principles of equal protection under our Constitution require that policies in our public hospitals be liberalized immediately. Other contentions advanced by Boyd are without merit in view of the rulings made.

The Court cannot legislate. A far more scientific and appropriate statute could undoubtedly be framed than what remains of the 1901 legislation. The asserted con-

stitutional right of privacy, here the unqualified right to refuse to bear children, has limitations. Congress can undoubtedly regulate abortion practice in many ways, perhaps even establishing different standards at various phases of pregnancy, if informed legislative findings were made after a modern review of the medical, social and constitutional problems presented. The Court ventures the suggestion that Congress should re-examine the statute promptly in the light of current conditions.

The motion of Dr. Milan Vuitch in both cases is granted as to him only. The motion of Shirley A. Boyd is denied. These remarks shall constitute the Court's opinion when transcribed. A prompt appeal to the United States Supreme Court under 18 U.S.C. § 3731 is highly desirable.

Counsel shall submit an appropriate order promptly.

GERHARD A. GESELL  
United States District Judge

NOVEMBER 10, 1969

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**HOLDING A CRIMINAL TERM**

[Filed November 10, 1969, Robert M. Stearns, Clerk—  
Criminal No. 1048-68]

**THE UNITED STATES OF AMERICA**

**v.**

**MILAN VUITCH**

**ORDER**

Upon consideration of the opinion of the Court on the Motion To Dismiss the Indictment herein against defendant, Milan Vuitch, it is by the Court this 10th day of November 1969.

Ordered, that the said Motion To Dismiss the Indictment against defendant, Milan Vuitch, be and the same is hereby granted and the indictment herein is dismissed.

**GERHARD A. GESELL**  
Judge

Seen:

**WM. H. COLLINS, JR.**  
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HOLDING A CRIMINAL TERM

[Filed November 10, 1969, Robert M. Stearns, Clerk—  
Criminal No. 1044-68]

THE UNITED STATES OF AMERICA

v.

MILAN VUITCH

ORDER

Upon consideration of the opinion of the Court on the Motion To Dismiss the Indictment herein against defendant, Milan Vuitch, it is by the Court this 10th day of November 1969.

Ordered, that the said Motion To Dismiss the Indictment against defendant, Milan Vuitch, be and the same is hereby granted and the indictment herein is dismissed.

GERHARD A. GESELL  
Judge

Seen:

WM. H. COLLINS, JR.  
Assistant U. S. Attorney

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**Criminal No. 1043-68**

**[Filed Dec. 10, 1969, Robert M. Stearns, Clerk]**

**UNITED STATES OF AMERICA**

**v.**

**MILAN VUITCH**

**NOTICE OF APPEAL**

Notice is hereby given that the United States of America hereby appeals to the Supreme Court of the United States from the order entered on November 10, 1969, dismissing the indictment in this case against the above-named defendant.

**/s/ Thomas A. Flannery  
THOMAS A. FLANNERY  
United States Attorney**

**/s/ John A. Terry  
JOHN A. TERRY  
Assistant United States  
Attorney**

**/s/ William H. Collins  
WILLIAM H. COLLINS  
Assistant United States  
Attorney**

**Date: December 10, 1969**

**Copy to:**

**Joseph Sitnick, Esq  
1511 K Street, N.W.  
Washington, D.C. 20005**

**SUPREME COURT OF THE UNITED STATES**

**No. 1155, October Term, 1969**

**UNITED STATES, APPELLANT**

**v.**

**MILAN VUITCH**

**APPEAL from the United States District Court for the District of Columbia.**

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

**April 27, 1970**

# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No.

UNITED STATES OF AMERICA, APPELLANT

v.

MILAN VUTCH

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

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## JURISDICTIONAL STATEMENT

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### OPINION BELOW

The memorandum opinion of the United States District Court for the District of Columbia (Appendix A, *infra*, pp. 9-15) is not yet reported.

### JURISDICTION

On November 10, 1969, the United States District Court for the District of Columbia entered an order granting a pre-trial motion to dismiss the indictment (Appendix B, *infra*, pp. 17-18), on the ground that a portion of the statute upon which the indictment was founded (22 D.C. Code 201) was unconstitutionally vague. A notice of appeal was filed in the district court on December 10, 1969. The jurisdiction of this

Court rests on 18 U.S.C. 3731, which authorizes a direct appeal from the decision of a district court dismissing an indictment based upon the invalidity of the statute upon which the indictment is founded. See, *e.g.*, *United States v. Petrillo*, 332 U.S. 1.

#### QUESTION PRESENTED

Whether the phrase "necessary for the preservation of the mother's life or health" contained in the District of Columbia abortion statute is unconstitutionally vague on its face.

#### STATUTE INVOLVED

22 D.C. Code 201 provides in pertinent part:

Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years: \* \* \*

#### STATEMENT

Separate and unrelated indictments in the District of Columbia were returned charging appellee, a licensed physician, and Shirley Boyd, a nurse's aide, with violations of the District of Columbia abortion law, 22 D.C. Code 201, *supra*.<sup>1</sup> Each defendant made

<sup>1</sup> The indictment against appellee was in two counts. The first charged him with procuring or producing an abortion on one Inez Fradin on or about February 1, 1968; the second with attempting to procure or produce the same abortion.



a pretrial motion to dismiss, and the district court consolidated the cases. After receiving briefs and hearing argument, the court dismissed the indictment against appellee but denied the motion to dismiss as to Miss Boyd.\*

Noting the statutory phrase "necessary for the preservation of the mother's life or health," and that the word "health" was nowhere defined in the statute, the district court was of the view that the word was "so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health" (Appendix, *infra*, p. 11). The court further found that the dilemma of the licensed practitioner was increased by the interpretation given the statute by the Court of Appeals for the District of Columbia in earlier decisions holding that, once the government proves that an abortion has been performed by a physician, the burden shifts to the physician to justify his acts. In other words, the district court concluded, "[the physician] is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health \* \* \*. The jury's acceptance or nonacceptance of an individ-

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\*The district court refused to dismiss the indictment as to non-physician Boyd on the ground that there was "ample evidence, and the parties so assert, that infection and death still often attend clumsy, unskilled terminations of pregnancy performed by non-physicians" and, accordingly, that "it was and still is well within the police power of the Congress to outlaw abortions that are not performed \* \* \* [by] a qualified, licensed practitioner of medicine" (Appendix, *infra*, p. 11).

ual doctor's interpretation of the ambivalent and uncertain word 'health' should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court."<sup>2</sup> (Appendix, *infra*, p. 12.)

#### THE QUESTION IS SUBSTANTIAL

The consequence of the district court's ruling is that any licensed physician in the District of Columbia may perform an abortion on a pregnant woman who desires it, for any reason whatsoever. The unconditional availability of abortions, unrelated to medical justification, is contrary to the manifest intent of Congress in enacting the instant statute and is at odds with the abortion laws of many States.<sup>4</sup> As the court below recognized, in these circumstances review of the decision by this Court is a matter of importance.

Although our principal contention, pp. 6-8, *infra*, is that the constitutional infirmity found by the district court may be avoided by a legitimate construction of

<sup>2</sup> The court further noted that "[o]ther uncertainties" in this phraseology were "discussed and documented" in *People v. Belous*, 80 Cal. Rptr. 354, 458 P. 2d 194 (Cal. 1969), petition for a writ of certiorari pending, No. 971, this Term. In *Belous* a divided court held that the statutory exception to the reach of its then applicable abortion provision (Section 274 Cal. Penal Code)—i.e., "unless the same is necessary to preserve [the woman's] life"—was unconstitutionally vague. The statutory provision involved in *Belous* makes no reference to "health".

<sup>4</sup> See American Law Institute, Model Penal Code, *Tent. Draft No. 9* (1959), p. 146.

the statute, we note at the outset that the district court departed from sound judicial practice by undertaking to pass on the validity of the statute on its face, divorced from "the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *United States v. Automobile Workers*, 352 U.S. 567, 591. A statute should not be held vague "on its face" where there exists a substantial class of situations to which the statute may validly be applied without raising constitutional issues. See *United States v. National Dairy Corporation*, 372 U.S. 29, 36; *United States v. Raines*, 362 U.S. 17, 21; *United States v. Petrillo*, 332 U.S. 1, 7.

Since the district court held the statute unconstitutional without establishing any of the facts of the offense charged here, it cannot be known whether the present case in fact raises any of the constitutional doubts expressed by the district court, which relate essentially to situations in which a physician purports to exercise medical judgment whether the operation should be performed. The district court was concerned with whether the statute provided a doctor with guidelines as to his exercise of that judgment and whether a jury should be allowed to pass upon the validity of his exercise of medical judgment.\* It is evident, however, that there may be many cases in

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\*While the court referred to a possible constitutionally protected right of the woman to decide whether to bear a child, it concluded that the state had an interest in preventing an abortion by an unlicensed physician. We think it is evident that the state equally has an interest in requiring a physician to act in his capacity as such, i.e., to make a medical judgment.

which no such question is presented because the defendant, although a doctor, does not exercise medical judgment.\* If a physician performs an abortion on a woman whom he has never before seen and whom he has not examined beyond establishing the fact of pregnancy, he clearly would not be exercising medical judgment.' Where the government's proof is of this character, the question whether a doctor did or did not exercise medical judgment clearly presents no problem beyond the competence of jurors to determine. Since the statute may be applied, without ambiguity, to doctors who do not exercise medical judgment at all, the district judge should not have invalidated the statute on its face because in his view there might be constitutional problems in cases where the evidence shows an exercise of judgment which the government sought to challenge. Before undertaking to invalidate the statute completely, the court below should at least have sought clarification (by way of a bill of particulars or stipulation of facts) \* as to whether the government intended to prove that the physician failed to exercise medical judgment.

Even in the situation to which the decision below is addressed—where an abortion is performed in the exercise of a doctor's professional judgment that it is medically justified—we think the court erred in hold-

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\* The very absence of decisions noted by the district court suggests that the question of medical judgment has not been presented by the cases tried.

\* Leaving aside, of course, the case of a specialist who performs an abortion upon the representation of the patient's doctor that the operation is therapeutically justified.

\* See *United States v. Halsey*, 342 U.S. 277.

ing the statute invalid on its face. The statute need not be construed to require a doctor who exercised medical judgment to establish to the satisfaction of the jury that his judgment was correct and that the abortion was in fact necessary "for the preservation of the mother's life or health." The criminal statute may fairly be construed as being inapplicable to a physician who concludes in good faith in the necessity of an abortion to preserve the mother's life or health. This construction is strongly supported in language contained in *Williams v. United States*, 138 F. 2d 81, 84 (C.A.D.C.), one of the cases relied upon below. It would also be consistent with the construction placed by this Court on comparable provisions of prior narcotics laws allowing a physician to dispense narcotics to addict-patients "in the course of his professional practice"; this Court held that a charge of violating the statute was subject to an absolute defense of good faith belief by the physician that the drugs were appropriate for treatment of the addict. *Linder v. United States*, 268 U.S. 5, 14-22; *United States v. Boyd*, 271 U.S. 104, 106-107. The same type of issue would often be presented under the abortion statute.

Moreover, while the word "health" admittedly does not lend itself to precise definition, that is not the critical determinant. All that is required is that the statutory language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States v. Petrillo*, 332 U.S. 1, 8; *United States v. National Dairy Corp.*, 372 U.S. 29, 32, and cases there cited. In

our view, the exception from the criminal penalties in the abortion statute is no more unclear than expert medical judgments regarding illness and health required in a variety of other related contexts: the area of mental responsibility for crime, for example. Cf. *Powell v. Texas*, 392 U.S. 514, 536-537. And even as to the class of cases to which, in our view, the reasoning of the district court might apply, the clarification of a factual setting would be helpful.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that probable jurisdiction should be noted.

ERWIN N. GRISWOLD,  
*Solicitor General,*

WILL WILSON,  
*Assistant Attorney General,*

BEATRICE ROSENBERG,

ROGER A. PAULEY,  
*Attorneys,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

FEBRUARY 1970.

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Criminal Nos. 1043-68, 1044-68

UNITED STATES OF AMERICA

v.

MILAN VUITCH

Criminal No. 1587-69

UNITED STATES OF AMERICA

v.

SHIRLEY A. BOYD

### *Memorandum Opinion*

These cases involve motions to dismiss indictments for abortion brought under Title 22, Sec. 201, of the D.C. Code. Vuitch is a physician licensed in the District of Columbia; Boyd is a nurse's aide. There is no relation between the two except that each defendant has moved to dismiss the indictment on the ground that the District of Columbia abortion statute is unconstitutional. The elaborate briefs, replete with authorities and background materials, have been considered, including the brief amicus of the American Civil Liberties Union. The arguments having been completed today, the Court is prepared to rule from the bench because of the public urgency of the matter.

While there have been many prosecutions under this statute over the years, there are very few deci-



sions interpreting it and none of recent vintage. Apart from the wording of the statute itself there is no significant legislative history giving any indication of the underlying congressional intent, either at the time of enactment or subsequent amendment. As far as can be ascertained, this is the first constitutional challenge of the statute and the issues presented in these motions have not been decided in this jurisdiction. The Court has taken judicial notice of the materials cited in the briefs but they are of such common understanding that they need not be elaborated on here in any detail.

The statute in question was originally enacted as part of the District of Columbia Code of 1901 and thereafter re-enacted with only slight modification. It provides in pertinent part:

"Whoever . . . produces an abortion . . . on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned. . . ."

A felony penalty of from one to ten years is provided.

Basically the motions attack the statute for *vagueness*, allege that its practical operation denies equal protection to certain economic and other groups subject to its sanctions and assert a constitutional right of all women, regardless of their circumstances, to determine whether or not they shall bear a child. Constitutional doctrines of recent evolution are referred to by analogy to reinforce the motions.

The statute does not prohibit all abortions. An abortion is permitted where done "as necessary for the preservation of the mother's life and health" and "under the direction of a competent licensed



practitioner of medicine." This two partite exception clearly points up a basic congressional concern with what may broadly be said to be medical factors. The Court has a duty to interpret the statute in a manner consistent with the apparent congressional intent. As the briefs and arguments have emphasized, there are still many health or medical problems created by the varying conditions under which abortions are performed. While there have been many advances in medical knowledge and techniques since 1901, there is nothing before the Court which establishes that abortions may be safely and hygienically performed at various stages of pregnancy except under medical direction. Indeed there is ample evidence, and the parties so assert, that infection and death still often attend clumsy, unskilled terminations of pregnancy performed by non-physicians.

Under these circumstances, it was and still is well within the police power of the Congress to outlaw abortions that are not performed under a "competent", that is, a qualified, licensed practitioner of medicine.

The true crux of the controversy here concerns the other part of the exception—"as necessary for the preservation of the mother's life or health." It is suggested that these words are not precise, that, as interpreted, they improperly limit the physician in carrying out his professional responsibilities, and that they interfere with a woman's right to avoid childbirth for any reason. The word "health" is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. While the law

generally has been careful not to interfere with medical judgment of competent physicians in treatment of individual patients, the physician in this instance is placed in a particularly unconscionable position under the conflicting and inadequate interpretations of the D.C. abortion statute now prevailing. The Court of Appeals established by such early cases as *Peckham v. United States*, 96 U.S. App. D.C. 312 (1955), *cert. denied*, 350 U.S. 912, and *Williams v. United States*, 78 U.S. App. D.C. 147 (1943), that upon the Government establishing that a physician committed an abortion the burden shifted to the physician to justify his acts. In other words, he is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health. These holdings, which may well offend the Fifth Amendment of the Constitution, as interpreted in recent decisions such as *Leary*, 395 U.S. 6 (1969), and *Gainey*, 380 U.S. 63 (1965), also emphasize the lack of necessary precision in this criminal statute. The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word "health" should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court. No body of medical knowledge delineates what degree of mental or physical health or combination of the two is required to make an abortion conducted by a competent physician legal or illegal under the Code. Other uncertainties in the phrase "as necessary for the preservation of the mother's life or health" are discussed and documented in *People v. Belous*, 80 Cal. Rep. 354 (1969), and need not be repeated here.

Thus the phrase under discussion will not withstand attack for it fails to give that certainty which due process of law considers essential in a criminal statute. Its many ambiguities are particularly subject to criticism for the statute unquestionably impinges to an appreciable extent on significant constitutional rights of individuals.

At common law abortion prior to quickening was not an offense. In fact, abortion did not become a statutory crime in the United States until about 1830. It has repeatedly been held, even under the D.C. statute, that the woman who aborts commits no offense. *Thompson v. United States*, 30 U.S. App. D.C. 352 (1908). There has been, moreover, an increasing indication in decisions of the Supreme Court of the United States that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy. *Griswold*, 381 U.S. 479 (1965), *Loving*, 388 U.S. 1 (1967). Matters have certainly reached a point where a sound, informed interest of the state must affirmatively appear before the state infringes unduly on such rights. The abortion debate covers a wide spectrum of considerations: moral, ethical, social, economic, legal, political and humanitarian, as well as medical. (See *Abortion*, Tietze & Lewit, *Scientific American*, January, 1969, Vol. 220, No. 1). But it does not appear to what extent Congress has weighed these matters in establishing abortion policy for the District of Columbia beyond an expression of a clear necessity of placing the matter in the hands of competent doctors.

The question is next presented whether the statute is severable, that is, whether it may be read as outlawing abortions except when performed under the

direction of a competent physician, eliminating only the preservation-of-life-or-health standard. Boyd, a non-physician, urges that because of the vagueness of the life-and-health phrase, the entire statute must fall. The Court concludes otherwise. The statute still protects a proper legislative and separate legislative objective if the one factor is stricken and the other allowed to remain. The Court is satisfied that the statute is severable (*United States v. Jackson*, 390 U.S. 570 (1968), *Stewart v. Washington*, 301 F. Supp. 610 (1969), and holds that Congress has constitutionally required that abortions be undertaken only under the direction of a competent physician. Title 2-102, 130 governing licensing of the healing arts is not sufficient to protect the congressional purpose of limiting abortions to competent physicians. Even if the Court accepts Boyd's claim to standing under liberal criteria of such cases as *Baker v. Carr*, 369 U.S. 186 (1962), and *Flast v. Cohen*, 392 U.S. 83 (1968), her challenge fails because the statute is severable.

Boyd's further contention that the statute discriminates against the poor and in its present operation denies medical help in city hospitals but is more liberally applied in some private hospitals has considerable support in the sketchy statistics and other data presented. The statute has received differing interpretations in the hospitals. In the light of the Court's ruling, however, there is no reason why the statute cannot henceforth be evenly applied throughout the city in a way which removes the principal basis for existing uncertainty and confusion. National and local policy provides free medical care for the poor. It is legally proper and indeed imperative that uniform medical abortion services be provided all segments of

the population, the poor as well as the rich. Principles of equal protection under our Constitution require that policies in our public hospitals be liberalized immediately. Other contentions advanced by Boyd are without merit in view of the rulings made.

The Court cannot legislate. A far more scientific and appropriate statute could undoubtedly be framed than what remains of the 1901 legislation. The asserted constitutional right of privacy, here the unqualified right to refuse to bear children, has limitations. Congress can undoubtedly regulate abortion practice in many ways, perhaps even establishing different standards at various phases of pregnancy, if informed legislative findings were made after a modern review of the medical, social and constitutional problems presented. The Court ventures the suggestion that Congress should re-examine the statute promptly in the light of current conditions.

The motion of Dr. Milan Vuitch in both cases is granted as to him only. The motion of Shirley A. Boyd is denied. These remarks shall constitute the Court's opinion when transcribed. A prompt appeal to the United States Supreme Court under 18 U.S.C. § 3731 is highly desirable.

Counsel shall submit an appropriate order promptly.

GERHARD A. GESELL,  
*United States District Judge.*

NOVEMBER 10, 1969.



**APPENDIX B**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**HOLDING A CRIMINAL TERM**

**(Filed November 10, 1969, Robert M. Stearns, Clerk—  
Criminal No. 1043-68)**

**THE UNITED STATES OF AMERICA**

**v.**

**MILAN VUITCH**

**ORDER**

Upon consideration of the opinion of the Court on the Motion To Dismiss the Indictment herein against defendant, Milan Vuitch, it is by the Court this 10th day of November 1969.

Ordered, that the said Motion To Dismiss the Indictment against defendant, Milan Vuitch, be and the same is hereby granted and the indictment herein is dismissed.

**GERHARD A. GESELL,**  
*Judge.*

Seen:

**WM. H. COLLINS, Jr.,**  
*Assistant U.S. Attorney.*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HOLDING A CRIMINAL TERM

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GERHARD A. GESELL,  
*Judge.*

Seen:

WM. H. COLLINS, Jr.,  
*Assistant U.S. Attorney.*





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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1969

No. ~~1155~~ **84**

UNITED STATES OF AMERICA,

*Appellant,*

—versus—

MILAN VUITCH, M.D.,

*Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

## MOTION TO AFFIRM

✓ JOSEPH SITNICK

1511 K Street, N.W.

Washington, D. C. 20005

JOSEPH L. NELLIS

1819 H Street, N.W.

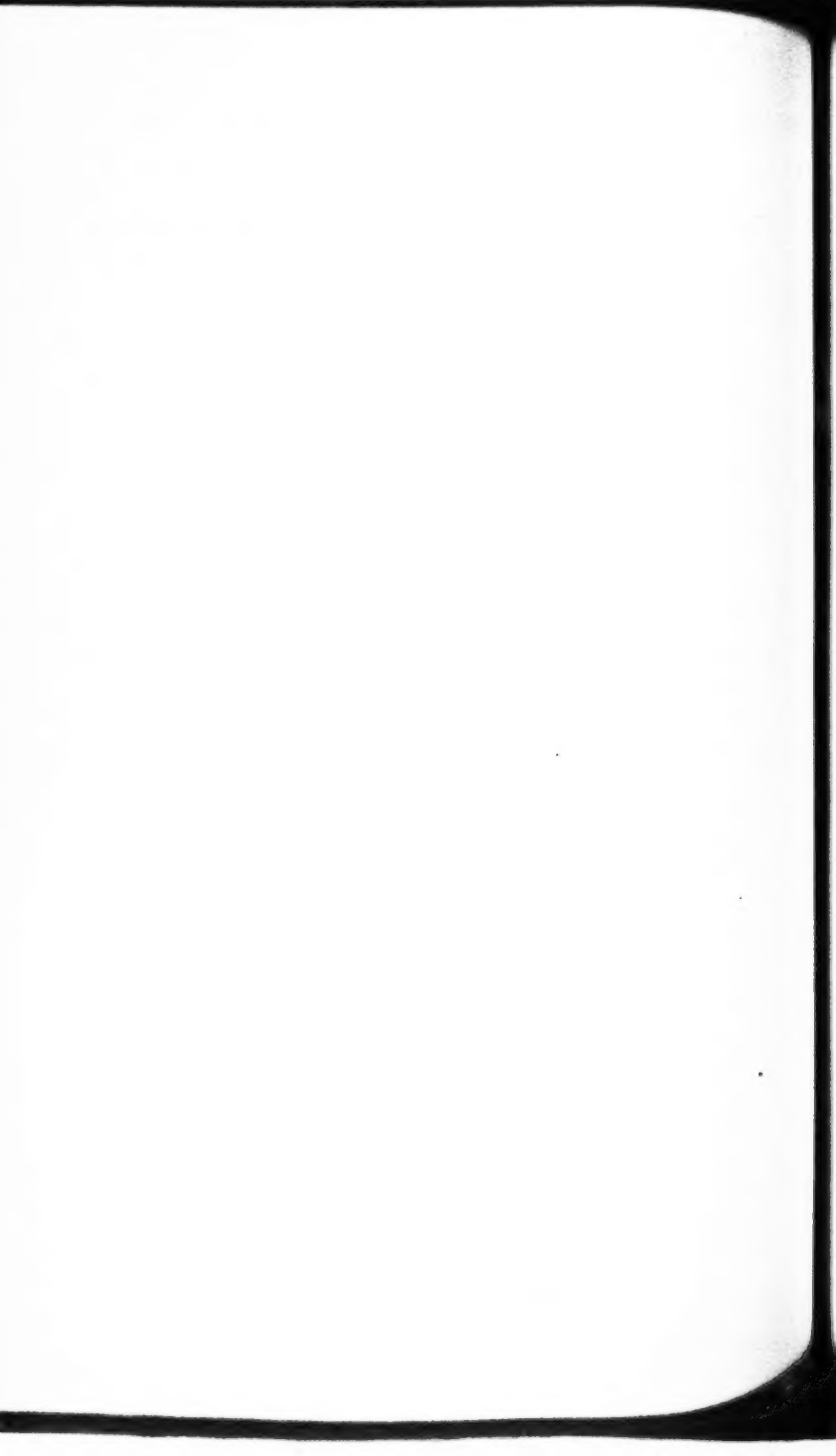
Washington, D. C. 20006

ROY LUCAS

26 West 9th Street

New York, N. Y. 10011

*Attorneys for Appellee.*



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1969

No. 1155

---

UNITED STATES OF AMERICA,

*Appellant,*

—versus—

MILAN VUITCH, M.D.,

*Appellee.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

**MOTION TO AFFIRM**

Appellee, pursuant to Rule 16, moves that the final judgment and decree of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

**Citation to Opinions Below**

The decision below of the United States District Court for the District of Columbia, Gesell, *J.*, is reported as *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *appeal docketed*, 38 U.S.L.W. 3303 (U.S. Feb. 5, 1970) (No. 1155, October 1969 Term).



## **Jurisdiction**

Appellant's Statement adequately states the jurisdictional basis for this appeal, i.e., 18 U.S.C. §3731.

## **Statute Involved**

D.C. CODE §22-201, at 19 (1967 ed.) provides:

"Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years. . . ."

## **Questions Presented**

I. Whether D.C. Code §22-201, which forbids a physician to interrupt pregnancy unless "necessary for the preservation of the mother's life or health" is unconstitutionally vague and indefinite, where the statute provides no warning to the physician, jury, or judge of what physical, mental, or social conditions may be taken into account when assessing necessity.

II. Whether D.C. Code §22-201 deprives physicians and their patients of rights protected by the First, Fourth, Fifth, and Ninth Amendments, and is neither narrowly drawn nor supported by any overriding and compelling governmental interest.

### Statement of the Case

Appellee Milan Vuitch, M.D., a licensed and practicing physician in the District of Columbia, was charged by indictment with violation of D.C. Code §22-201, a statute of 1901 vintage. Appellee moved at pretrial to dismiss the indictment, contending that the statute was unconstitutional on various grounds. Upon the receipt of extensive briefs and oral argument, the district court, Gesell, J., granted this motion.<sup>1</sup> The court held the statute to be unconstitutionally vague and indefinite. 305 F. Supp. at 1034. Moreover, the court recognized that certain Fifth Amendment questions existed because the physician was "presumed guilty," 305 F. Supp. at 1034, and that "the statute unquestionably impinges to an appreciable extent on significant constitutional rights of individuals." *Id.*

It is from this decision, invalidating the statute on its face and as applied against physicians as a class, that the government has taken this direct appeal.<sup>2</sup>

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<sup>1</sup> A companion case, *United States v. Boyd*, 305 F. Supp. 1032, 1035-36 (D.D.C. 1969) (not appealed), grew out of a completely unrelated incident involving a nurse's aide, and has no bearing upon this appeal although Appellants have discussed that "unrelated" case in their Statement, pp. 2-3.

<sup>2</sup> The Jurisdictional Statement does not challenge the lower court's holding that the statute is severable and may be validly applied to prohibit all abortions done by non-physicians. 305 F. Supp. at 1035; see, e.g., *United States v. Jackson*, 390 U.S. 570, 585-91 (1968). Thus, the question of severability is not at issue in this appeal.

## The Questions Are Not Substantial

The decision below is so manifestly correct as not to warrant further argument before it is affirmed by this Court.

### Introduction

The constitutionality of abortion laws has been much in the minds of judges and commentators even before the landmark decision of *California v. Belous*,<sup>5</sup> and the present case.

Professor Emerson at Yale suggested in December of 1965 that the *Griswold* case would open the way "for an attack upon significant aspects of the abortion laws."<sup>6</sup> Retired Justice Tom C. Clark, writing in 1969, fully agreed.<sup>7</sup> Recognizing that "[if] the medical profession is to be accorded complete protection, it will have to come through the judicial system,"<sup>8</sup> Justice Clark suggested that, constitutionally, "until the time that life is present, the State cannot interfere with the interruption of pregnancy through an abortion performed in a hospital or under appropriate clinical conditions."<sup>9</sup> Other commentators have taken a like view.<sup>10</sup>

<sup>5</sup> 71 Cal.2d 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), cert. denied, 397 U.S. — (1970).

<sup>6</sup> Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. L. Rev. 219, 232 (1965).

<sup>7</sup> Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 Loyola Univ. (L.A.) L. Rev. 1 (1969) [hereinafter Clark].

<sup>8</sup> Clark, p. 7.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. Rev.

Several courts have already faced constitutional questions similar to those presented in this action. The first, a lower court in California, ruled on September 24, 1968, that the pre-1967 felony abortion statute in that state violated the Eighth and Fourteenth Amendment rights of certain patients. Their physicians had been charged with unprofessional conduct.<sup>9</sup> They had performed hospital-approved therapeutic abortions on patients who had been exposed to the German measles virus.

One year later the Supreme Court of California rendered its decision in *California v. Belous*.<sup>10</sup> A close reading of Judge Peter's opinion reveals four separate grounds for the decision: (1) facial unconstitutional uncertainty;<sup>11</sup> (2) unconstitutional abridgement of the woman's right to choose whether to bear children,<sup>12</sup> if (a) the statute were construed to require "certainty of death,"<sup>13</sup> or (b) if the statute were construed to "prohibit an abortion, where death from childbirth although not medically certain, would be substantially certain or more likely than not";<sup>14</sup> (3) unconstitutional uncertainty if the statute were construed to mean "substantially or reasonably necessary to pre-

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730 (1968); Note, *Constitutional Aspects of Present Criminal Abortion Law*, 3 Valpr. U.L. Rev. 102 (1968).

<sup>9</sup> *Shiveley v. Board of Medical Examiners*, No. 590333 (Cal. Super. Ct., San Fran. Cty., Sept. 24, 1968) (not reported), on remand from 65 Cal.2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1968) (granting physicians' motions for discovery).

<sup>10</sup> 71 Cal.2d 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

<sup>11</sup> 71 Cal.2d at 1003, 458 P.2d at 197, 80 Cal. Rptr. at 357.

<sup>12</sup> 71 Cal.2d at 1005, 458 P.2d at 199, 80 Cal. Rptr. at 359.

<sup>13</sup> 71 Cal.2d at 1005, 458 P.2d at 199, 80 Cal. Rptr. at 359.

<sup>14</sup> 71 Cal.2d at 1012, 458 P.2d at 203, 80 Cal. Rptr. at 363.

serve"<sup>15</sup> the woman's life; and (4) a Fourteenth Amendment violation because of "[t]he delegation of decision-making power to a directly involved individual . . . ."<sup>16</sup>

Declaratory judgment actions involving state abortion statutes are pending before three-judge federal courts in several states.<sup>17</sup>

This epidemic of judicial activity in the abortion area recognizes that the medical profession is unable to work with the vagueness and potential sweep of the statutes which regulate abortion, and no other surgery, in the 50 states and the District of Columbia. The statute in the District, moreover, is unique. Its wording, which appears in

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<sup>15</sup> 71 Cal.2d at 1012, 458 P.2d at 204, 80 Cal. Rptr. at 364.

<sup>16</sup> 71 Cal.2d at 1015, 458 P.2d at 206, 80 Cal. Rptr. at 366.

<sup>17</sup> See, e.g., *Hall v. Lefkowitz*, 305 F. Supp. 1030, 69 Civ. 4224 (S.D.N.Y., filed Sept. 30, 1969) (before Friendly, J., and Weinfeld & Tyler, D.J.J.); *Babbitz v. McCann*, 306 F. Supp. 400, 69-C-548 (E.D. Wis.) (before Kerner, J., and Reynolds & Gordon, D.J.J.).

*California v. Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct. Orange Cty. Jan. 9, 1970), has recently invalidated the current California abortion statute in a criminal prosecution of a physician. The decision rests upon numerous grounds, including the right of a woman to decide whether to bear children, and the presence of economic discrimination in violation of the equal protection clause of the Fourteenth Amendment.

In June of 1969, the Supreme Judicial Court of Massachusetts sustained its abortion statute over a challenge of vagueness. *Kudish v. Board of Registration*, — Mass. —, 248 N.E.2d 264 (1969) (not appealed).

Similarly, *Moretti v. New Jersey*, 52 N.J. 182, 244 A.2d 499, cert. denied, 393 U.S. 952 (1968), upheld the abortion law of that state over a vagueness challenge. The New Jersey law, however, prohibits abortions performed "maliciously or without lawful justification," N.J. STAT. §2A:87-1, and the abortion in that case was to have been performed by an inspector for the State Board of Barber Examiners.

only one other state abortion law,<sup>18</sup> is vague and restrictive of the physicians' and patients' rights who must attempt to operate within its uncertain peripheries.

## I.

D.C. Code §22-201, which forbids a physician to interrupt pregnancy unless "necessary for the preservation of the mother's life or health" is unconstitutionally vague and indefinite, because it provides no warning to the physician, jury, or judge of what physical, mental, or social conditions may be taken into account when assessing necessity.

### *The Legal Standard*

A vast body of case law exists on the problem of unconstitutional uncertainty.<sup>19</sup> This doctrine has, moreover, several complementary, and several competing strands. The test most frequently articulated has been that

"a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and

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<sup>18</sup> ALA. CODE tit. 14, §9 (1958). See generally George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. Res. L. Rev. 371 (1966); Lucas, *Abortion Laws in the United States*, in ABORTION: LEGAL, MEDICAL, SOCIAL, and RELIGIOUS ASPECTS (R. Lucas ed. 1970) (in press).

<sup>19</sup> See generally Amsterdam, *The Void for Vagueness Doctrine*, 109 U. Pa. L. Rev. 67 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 Corn. L.Q. 195 (1955); Aigler, *Legislation in Vague or General Terms*, 21 Mich. L. Rev. 831 (1923); Freund, *The Use of Indefinite Terms in Statutes*, 30 Yale L.J. 437 (1921); Note, 62 Harv. L. Rev. 77 (1948).

differ as to its application, violates the first essential of due process . . . ."<sup>20</sup>

This is partly because

"it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large."<sup>21</sup>

Clearly, "[v]ague laws in any area suffer a constitutional infirmity,"<sup>22</sup> be they of common law antiquity,<sup>23</sup> administrative,<sup>24</sup> or criminal.<sup>25</sup> Furthermore, statutes challenged for vagueness which impinge upon sensitive human rights are to be closely scrutinized. *Griswold v. Connecticut* dealt with "a right of privacy older than the Bill of Rights . . ."<sup>26</sup> and that right is invoked again here, as well as the right to give medical advice, which is more nearly a facet of pure freedom of speech. Thus, "[p]recision of regulation must

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<sup>20</sup> *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

<sup>21</sup> *United States v. Reese*, 92 U.S. 214, 221 (1875).

<sup>22</sup> *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) (ancient common law offense of "criminal libel" void for uncertainty).

<sup>23</sup> *Lanzetta v. New Jersey*, 306 U.S. 451, 454-55 (1939); *Chaplin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 242-43 (1932). See also *United States v. Evans*, 333 U.S. 483 (1948), in which the statute had been passed in 1917; and *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), in which the statute had been passed in 1860.

<sup>24</sup> See, e.g., *Keyishian v. Regents*, 385 U.S. 589 (1967).

<sup>25</sup> *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

<sup>26</sup> 381 U.S. 479, 486 (1965).

... in an area so closely touching our most  
be the touchstones." <sup>27</sup>

precious freedoms never ruled on a vagueness challenge to

This Court has, but the invalidity of the language follows  
a similar statutes of the difficulties a physician must face  
from an analysis  
in applying it.

### *Statute in Practice*

*Vagueness of the* and legal commentary have recognized the  
Both medical American abortion laws. Retired Justice  
uncertainty of remarked:

Clark recently r  
ing number of abortions subjects physi-  
"The increased dangers of liability for incorrectly  
cians to inc; a statute . . . . [D]octors face an uncer-  
interpreting when performing an abortion. This uncer-  
tain fate will continue unless the legislatures or courts  
tainty will relief from liability." <sup>28</sup>  
provide relief

Christopher Tietze, perhaps internationally the most  
knowledgeable authority on abortion practices and statis-  
tics, commented

"The application of these laws, however, varies greatly  
between localities and between hospitals." <sup>29</sup>

<sup>27</sup> *NAACP v. Button*, 371 U.S. 415, 438 (1963).

<sup>28</sup> Clark, p. 7.

<sup>29</sup> Tietze, *Maternal Mortality Associated With Legal Abortion*,  
Proceedings of the Fifth International Conference on Planned  
Parenthood 24 (Oct. 1955) (Tokyo); see also M. CALDERONE,  
*ABORTION IN THE UNITED STATES* 34-35, 52 (1958):

"[N]ecessity as a sine qua non of performing an abortion . . .  
leaves the doctor's position perilous and uncertain. \* \* \* The  
current laws provide no accurate criteria by which the doc-  
tor can govern his actions."



Similarly, a 1967 study concluded:

"Abortion policies vary not only from hospital to hospital but also from service to service within the same hospital. They also vary widely from doctor to doctor on the same service of the same hospital."<sup>20</sup>

And, as Dr. Alan F. Guttmacher indicated in an early study, "[t]he doctor's dilemma lies in the phrase 'preserving the life of the woman.'"<sup>21</sup> If "preserving life" is a difficult standard, then "preserving health" only accentuates the "doctor's dilemma."

Appellants have urged that "the statute may be applied without ambiguity, to doctors who do not exercise medical judgment at all . . ." (J.S., at 6). Yet such a formulation would increase the ambiguity of the statute, for a jury would be left to determine whether the physician had, indeed, exercised a "medical judgment." Many physicians consider a woman's personal desire not to be compelled to have further children as sufficient justification for abortion. A study conducted by the journal *Modern Medicine* in fact showed that 51% of American physicians, and 61.4% of physicians in the District of Columbia agreed without qualification that abortion should be available to any woman capable of giving legal consent upon her own

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<sup>20</sup> Hall, *Abortion in American Hospitals*, 57 Am. J. Pub. Health 1933, 1935 (1967). Dr. Hall continues:

"The victim of all this confusion is, of course, the American female . . . [S]he must find Doctor X in hospital Y with policy Z in order to have it done." *Id.*

<sup>21</sup> Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma*, 21 J. Mt. Sinai Hosp. 111 (1954). See also Niswander, *Medical Abortion Practices in the United States*, 17 W. Res. L. Rev. 403, 411-419 (1965).

request to a competent physician." The sphere of medical judgment, in such a case, then narrows to the medical question of whether reasons exist for *not* performing the requested abortion, a circumstance which is exceedingly rare (and unregulable by the blunderbuss of a criminal statute) in this day when abortion in early pregnancy is seven times *safer* than its alternative—childbirth."

In no sphere of medicine other than abortion does a criminal statute impose such a burden upon a physician, and in no other sphere of medical practice is treatment restricted by criminal law to those instances in which it is "necessary for the preservation of the mother's life or health." The Court might consider the impact on the lives of all citizens if a penal statute prohibited gall bladder surgery, kidney stone removal, the prescription of contraceptives," use of antibiotics, vaccination," or even the taking of aspirin "unless necessary for the preservation of the life or health" of the patient. There are and never have been such laws or practices, outside of the quite different realm of drug regulation. It is from this area that Appellant has drawn *Linder v. United States*, 268 U.S. 5

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"*Modern Medicine*, Nov. 3, 1969, at 18-24. An additional 11.8% nationally and 11.2% in the District agreed to the proposition, but with some qualification.

"See Tietze, *Mortality With Contraception and Induced Abortion*, 45 *Studies in Family Planning* 6 (1969), and other authorities cited in note 67, *infra*.

"*Griswold v. Connecticut*, 381 U.S. 479 (1965), at least implies that such a requirement would violate the patient's right of privacy, but Connecticut, for obvious reasons, made no such contention.

"*Jacobson v. Massachusetts*, 197 U.S. 11 (1904), has even held that a State may compel vaccination over the stringent religious objections of an unwilling patient.

(1925), and *Boyd v. United States*, 271 U.S. 104 (1926), on which great reliance is placed (J.S., at 7).

*Linder* and *Boyd* involved the question of a physician's dispensing "hard" narcotics (i.e., morphine and cocaine). The statute required that this be done "in the course of his [the physician's] professional practice only."<sup>22</sup> This Court found in *Linder* that "[w]hat constitutes *bona fide* medical practice must be determined upon consideration of evidence and attending circumstances." 268 U.S. at 18. This was not a decision, as Appellant states, that "the statute was subject to an absolute defense of good faith belief by the physician that the drugs were appropriate for treatment of the addict" (J.S., at 7).

In several respects *Linder* and *Boyd* are inapposite and inapplicable. Trafficking in hard narcotics is socially reprehensible conduct, for which statutory standards of specificity need not be so stringent. Abortion, like contraception, however, involves sensitive individual rights, see *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), and most frequently the "intimate relation of husband and wife and their physician's role in one aspect of that relation." Privacy in family planning is today a value which government promotes. Moreover, the problem of hard narcotics is susceptible to much sharper analysis than that of abortion. One can separate out the physician who helps an addict withdraw from one who feeds a habit for profit. With abortion, however, there is no such line, and the statute has not drawn an intelligible point of demarcation. Many physicians believe that a woman's unwillingness to

be forced through pregnancy is a sufficient health problem

<sup>22</sup> Harrison Narcotic Law, 38 Stat. 785, as amended, 40 Stat. 1130.

to justify abortion. The statute, taken with a defense of good faith, is no guarantee of acquittal before a jury of laymen with a different view. What is evident in the Government's attack on the District Court's decision is that it insists upon the doctor's bearing of the burden of proof of innocence, i.e., that he in fact used medical judgment. Moreover, a jury must agree with what he conceived to be medical justification for the treatment involved before acquitting him. Such is the very essence of the constitutional fault in this statute and other statutes like it. On any analysis of this vague requirement, altogether lacking acceptable standards, there will never be an instance in which a physician is able to defend his actions successfully where the evidence shows an exercise of medical judgment which the Government seeks to challenge.

Additionally, the requirement of consultation (which question the Government here contends should be submitted to a jury) before performing the operation, or as the Government puts it, the requisite exercise of medical judgment, causes the burden to shift to the defendant to prove that his action was necessary to preserve the mother's life or health and leaves the defendant on the horns of a desperate dilemma. If he fails to come forward (as is his constitutional right), the jury will be left without proof upon which even to speculate as to whether or not medical judgment was exercised. If he does come forward and the jury is left to speculate on his medical judgment, he could well be convicted of providing acceptable medical treatment ~~with~~ which a lay jury could totally disregard for any number of speculative reasons. In effect, therefore, the doctor-defendant would seriously risk conviction no matter whether he chose to come forward or remain

silent. Aside from the unsatisfying prospect that a jury should pass on medical judgment (which is the sole function of the physician after diagnosis and consultation) the theory which the Government would ask the Court to approve here would convict the defendant whether or not he takes the stand if the jury should believe that the medical judgment he exercised was, in its opinion, inadequate. A statute having such an effect is fatally defective, as found by the District Court, and as underscored by this Court's decisions in *Tot v. United States*, 319 U.S. 463 (1943); *United States v. Gainey*, 380 U.S. 63 (1965); *United States v. Romano*, 382 U.S. 136 (1965); and *Leary v. United States*, 395 U.S. 6 (1967). As the District Court points out, this Court has long since left behind the ancient theory that legislators may compel presumptions, the effect of which are to deny an accused his constitutional rights.

It is the patient's entire life-setting which is ideally taken into account today, not simply whether a disease will lead to his or her death or disability. It is largely because of this civilized progress in medicine that the statute has become increasingly vague through the years. Life has become more than survival. It has been seen to contain a spectrum of conditions, matters of degree which contribute to the quality of existence, rather than the bare fact of survival. Health has come to embrace the entire sphere of physical and mental well-being.

Ultimately the question is one of law for this Court to resolve. Based on the available evidence, and this Court's reading of the statute, a decision must be reached on whether Appellee, other physicians, and their patients will be consigned to living under the regime of this statute.

The expression challenged for vagueness is:

"necessary for the preservation of the mother's life or health . . . ." D.C. CODE §22-201.

**(a) Vagueness of "life"**

The very term "life" is susceptible to widely differing interpretations. Does it mean immediate survival? probable survival for a period of days? weeks? months? years? Is "life" equivalent to longevity? Does a patient's "life" encompass her physical and mental "health"? the "quality of life"? her overall well-being? her desire and life plan to be no longer burdened with additional children? These are common concerns in medicine, but the statute does not speak to these very realistic human problems, and no set of jury instructions, however well phrased by a trial judge, could lead a jury through the maze of these issues to a fortified conclusion as to a physician's guilt or innocence.

Also, who is to decide what constitutes the concept of a woman's "life"? she? her husband? the physician? a jury of twelve laymen? one or more judges? Ultimately this question will go to a jury on conflicting evidence, without statutory guidance, subject to an uncertain degree of judicial review. Should a physician and his patient be required to take this very great risk on no more guidance than the statute provides?

**(b) Vagueness of "health"**

As Judge Gesell noted below:

"The word 'health' is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health."  
305 F. Supp. at 1034.

A 1943 decision delivered by then Associate Justice Arnold of the Court of Appeals for this Circuit found that the provision of the statute "is a broad exception without precise limits." *Williams v. United States*, 78 U.S. App. D.C. 147, 150, 138 F.2d 81, 84 (1943). Compare *Musser v. Utah*, 333 U.S. 95, 97 (1948) ("acts injurious to public morals" may include "almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health [etc.] . . .").

Indeed, preservation of "health" could mean relief from any burden upon the woman and her family. On the other hand, a more rigid construction could mean only relief from a pregnancy which would make the woman an absolute broken physical wreck at the end of pregnancy. The statute, and a "good faith" defense, however, do not provide the physician with any knowledge of which meaning a court and jury will adopt; yet his personal liberty and the right to practice his profession depend entirely upon the jury's acceptance or rejection of that defense.

### (c) Vagueness of "preservation" <sup>27</sup>

On its face, and even more seriously when taken in connection with the other terms, "preservation" or "preserve" can bear many meanings. Does it mean to keep alive and, if so, for how long? Or does it mean to keep free from harm or injury? serious injury? how serious?

Is "preserve" synonymous with "save," and, if so, does not "save" have too wide a range of meanings to be used in

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<sup>27</sup> *California v. Belous*, 71 Cal.2d 996, 1003, 458 P.2d 194, 198, 80 Cal. Rptr. 354, 358 (1969), found the term "preserve" too vague for use in a criminal abortion statute.



a statute affecting such important interests as those of the physician and patient? Or, is "preserve" a much broader notion, meaning maintain, protect, safeguard, enrich? The statute and the cases are silent. Again, the question goes to the lay jury, without guidelines.

(d) Vagueness of "necessary" "

The first three difficult terms are joined by a fourth "necessary." How necessary? Why necessary? Necessary to what end? The lawyer's standard dictionary states that the word "necessary"

"must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought." BLACK'S LAW DICTIONARY 1181 (4th ed. 1967).

The statute gives no indication as to which of the possible meanings of "necessary" applies, nor the factors which may permissibly be taken into account. The judge and jury are permitted to consider any factors they choose. A statute which permitted only "necessary" noise was recently struck down by a district court in Pennsylvania.<sup>25</sup> This Court in *Yu Cong Eng v. Trinidad*<sup>26</sup> has described the term "necessary" as one of "great indefiniteness," 271 U.S. at 517,

<sup>25</sup> *California v. Belous*, 71 Cal.2d 996, 1003, 458 P.2d 194, 198, 80 Cal. Rptr. 354, 358 (1969), found this term to be too indefinite as well.

<sup>26</sup> *Phillips v. Borough of Polcroft*, 305 F. Supp. 766 (E.D. Pa. 1969) (J. S. Lord, III, J.).

<sup>27</sup> 271 U.S. 500 (1926) (Taft, C.J.).



"a vague requirement and one objectionable in a criminal statute." 271 U.S. at 518. It is indeed.

. . . . .

In sum, the terminology of the statute provides almost no guidance to the conscientious physician who seeks to consider the overall circumstances and well-being of a woman faced with an unwanted pregnancy. The uncertainty of the words in isolation is multiplied by their usage together in the statute. This vagueness is further compounded by the fact that physicians in the District of Columbia have the burden of proving necessity and good faith if they should be charged with unjustifiable abortion.<sup>41</sup> It is evidenced by the medical and legal commentary cited. Its effect has been to produce differing interpretations from physician to physician, and hospital to hospital, as well as inherent discrimination against the poor woman who cannot purchase the information and psychiatric help sufficient to obtain a favorable "interpretation."<sup>42</sup>

For the reasons stated, the statute is plainly unconstitutional for its failure to meet the specificity requirements of the due process clause of the Fifth Amendment.

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<sup>41</sup> See *Williams v. United States*, 78 U.S. App. D.C. 147, 158 F.2d 81 (1943).

<sup>42</sup> Appellee has also raised and intends to preserve the contention that the statute violates the equal protection concept embodied in the Fifth Amendment by its impact on excluded classes of patients, i.e., the poor patient and the woman who cannot persuade a hospital that continued pregnancy endangers her "health." See, *Bolling v. Sharpe*, 347 U.S. 497 (1954). These points will be presented in greater depth by the brief on the merits, should this be necessary.

## II.

D.C. Code §22-201 deprives physicians and their patients of rights protected by the First, Fourth, Fifth, and Ninth Amendments, and is neither narrowly drawn nor supported by any overriding and compelling governmental interest.

Not only does Appellee challenge the vagueness of the statute, but also its substantive validity under the First, Fifth, and other amendments to the United States Constitution. This Court may hold that the statute is not uncertain and that it bears one or another construction which will sustain it. However, it is most unlikely that the statute, as written and re-enacted, can be construed to permit an abortion, in clinical surroundings, of a woman in good health, who has had contraceptive failure, or did not for some reason utilize contraceptives. Such a woman is the individual whose request for an abortion, in the very early stages of pregnancy, is most frequent.

Even assuming that this Court enjoins the statute for vagueness, the further question of overbreadth should be reached and decided. This has been the practice of the Court in a wide variety of cases, particularly where freedom of association<sup>4</sup> was at issue, as it is here. "[It] would furnish a definitive ruling on a point of federal law for . . . future guidance . . ." of the parties. A final "definitive ruling" on the federal questions raised hereinafter would avoid costs and delay, prevent continued litigation on the substantive issues, and conserve judicial time and resources.

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<sup>4</sup> See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963).

<sup>5</sup> *LSCRC v. Wadmond*, 299 F. Supp. 117, 123 (S.D.N.Y. 1969) (Friendly, J.).

### A. The Rights to Give and Receive Medical Advice and Treatment

The present action has First Amendment implications, namely the right of the physician to provide medical information, followed by treatment, for his patients, and the right of the patient to receive same. The right of a competent licensed physician to give medical advice can be characterized as free expression alone,<sup>44</sup> or when viewed as an aspect of the physician-patient relationship, it becomes part of the freedom of association between physician and patient. The First Amendment has long been held to accord presumptive protection for the "freedom to associate and privacy in one's associations." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). This has been the case with the mari-

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<sup>44</sup> Similarly, it is an aspect of the physician's general liberty under the Fifth Amendment to practice his chosen profession free from unconstitutional restraint. See *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102-03 (1963); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Birnbaum v. Trusell*, 371 F.2d 672 (2d Cir. 1966); see also *United States v. Freund*, 290 Fed. 411 (D. Mont. 1923), invalidating a Prohibition act which restricted the amount of alcohol a physician could prescribe:

"It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice."

With respect to the prescription of contraceptives, moreover, physicians received considerable protection in many early cases to the point that the various Comstock acts took the path of desuetude. See, e.g., *United States v. Nicholas*, 97 F.2d 510 (2d Cir. 1938) (L. Hand, J.); *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936) (A. Hand, J.); *Youngs Rubber Corp. v. C. I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930) (Swan, J.).

tal relationship," and that of attorney and client." The relationship between physician and patient is no different; it promotes the fundamental purpose of maintaining the health and well-being of the American people.

The advice aspect of medical practice is but one part of Appellee's claim, for medical treatment involving interruption of the unwanted pregnancy may be what the patient ultimately requests, and the criminal statute proscribes.

"[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest . . . must appear. . . ."  
*United States v. O'Brien*, 391 U.S. 367, 376 (1968).

The nature of this interest has been described by "a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." 391 U.S. at 376-77 (citations omitted).

Before discussing the possible State interests which have been offered to compel a woman to bear and raise children against her will, Appellee will examine various other rights of constitutional dimension which the challenged statutes curtail.

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<sup>44</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), describing the "marriage relationship" as

"an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

<sup>45</sup> See *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railway Trainmen v. Virginia*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar*, 389 U.S. 217 (1967).

## B. The Right of Privacy

The antecedents and progeny of *Griswold v. Connecticut*, 381 U.S. 479 (1965), offer generalized support for applying a presumptive constitutional right of privacy to encompass the right of a woman to have an abortion, in the early stages of pregnancy, when contraception failed or was not used.

*Griswold* is not an isolated decision confined to its facts, but is one in a continuing line of cases involving various aspects of personal privacy and family autonomy.<sup>48</sup> Most recently this Court recognized a "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (Marshall, J.). Indeed, the *Stanley* case is of special importance, for there a majority of the Court embraced with approval the very significant language from Mr. Justice Brandeis' dissent in *Olmstead v. United States*:

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to

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<sup>48</sup> Commentary on the *Griswold* case has been extensive. Particularly noteworthy materials include: Kelly, *Clio and the Court: An Illicit Love Affair* [1965] SUP. CT. REV. 119; Gross, *The Concept of Privacy*, 42 N.Y.U. L. Rev. 34 (1967); Pilpel, *Birth Control and a New Birth of Freedom*, 27 Ohio St. L.J. 679 (1966); Franklin, *The Ninth Amendment*, 40 Tul. L. Rev. 487 (1966); Beane, *The Griswold Case and the Expanding Right to Privacy*, 1966 Wm. L. Rev. 979; Symposium—*Comments on the Griswold Case*, 44 Mich. L. Rev. 197 (1965); Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814 (1966); Note, *The Supreme Court—1964 Term*, 79 Harv. L. Rev. 56, 162-65 (1965).

protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.” 277 U.S. at 478.

*Olmstead's dissent* was also quoted with approval by Burger, Circuit Judge, in *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1010, 1016-17 (D.C. Cir.) (1964), *en banc* (dissenting opinion), *cert. denied*, 377 U.S. 978 (1964). The District Court (1964).

of Columbia abortion law, if strictly construed, gives little consideration to a woman's feelings, pains, thoughts, and emotions. It impinges severely upon her dignity, her life plan, and her marital relationship if she has one. It is a first order invasion of her privacy with irreparable consequences.

Retired Justice Tom C. Clark has suggested that the concept of privacy should include control over family planning beyond the stage of contraception. He wrote:

“[A]bortion—the marital privacy is falls within that sensitive area of privacy decision. One of the basic values of this relation. One of the basic values of this the fetus. birth control, as evidenced by the *Griswold* protected. *Griswold's* act was to prevent formation of why can he? This, the Court found, was constitutionally has failed? If an individual may prevent contraception, not nullify that conception when prevention

The protection of family context over fifty years of various rights in the marital and has firm origins in decisions dating back

\* Clark, p. 9.

A first and recent example, *Loving v. Commonwealth*, 388 U.S. 1, 12 (1967) (alternate ground of decision), specifically held that the due process clause of the Fourteenth Amendment protects "[t]he freedom to marry . . . as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving* stands for the proposition that "the right to marry" is protected by the due process clause although not specifically mentioned in the Bill of Rights. The decision must lend further support to arguments that other important interests associated with marriage and the family are protected from arbitrary government intrusion.

Associated with the right to marry is the right to raise children, if one chooses, without arbitrary governmental interference. A unanimous Court indeed has held that "the right to have offspring" is a constitutionally protected "human right" which cannot be taken away by a discriminatory statute requiring the sterilization of some persons convicted of crime, but not of others similarly situated. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942). Again, the right to have offspring is not mentioned in the Bill of Rights. However, the *Skinner* Court, composed of Justices Douglas (author of the opinion), Black, Reed, Frankfurter, Murphy, Byrnes, Roberts, Jackson, and Chief Justice Harlan Fiske Stone (the latter two wrote concurring opinions) had no difficulty holding that this right was protected by the Constitution. Moreover, these members of the Court had all disassociated themselves from the economic substantive due process school of thought found in the much criticized and overruled opinion of *Lochner v. New York*, 198 U.S. 45 (1905).



Assuming, then, that the right to have offspring enjoys a constitutional presumption of protection, should not a right not to have offspring be of equal stature under the Constitution?

Further cases upholding rights associated with the family include *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), both of which were subsequently reaffirmed in *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). A unanimous Court in *Pierce* recognized a right to send one's children to private school. This right was derived from "the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35. The *Pierce* Court, moreover, included Justices who rejected the economic due process formula of *Lochner*, namely Justices Brandeis, Holmes, and Stone. On the basis of *Pierce*, is it not reasonable to argue that parents also should have a right to determine how many children whose "upbringing and education" they will direct? Not dissimilar to *Pierce* was *Meyer*, a 7-2 decision invalidating a State statute which prohibited the teaching of German to pupils below the eighth grade. The *Meyer* Court found that the due process clause included "the right . . . to marry, establish a home and bring up children." 262 U.S. at 399. Again, the decision is not objectionable as a manifestation of economic due process because it was joined by Justice Brandeis, among others, who rejected the *Lochner* scheme. The dissents, moreover, by Justices Holmes and Sutherland, rested on the assumption that the State had a substantial interest in assuring that foreign-born students and students of alien parentage had considerable training in the English language before being exposed to other languages.



Taken together, the *Griswold*, *Stanley*, *Loving*, *Skinner*, *Pierce*, and *Meyer* decisions all illustrate that the Constitution protects certain privacy and family interests from government intrusion unless a compelling substantial justification exists for the legislation.<sup>22</sup> Appellee contends that the right of a patient to determine whether to have additional children, and if not then to terminate a pregnancy in its early stages, is such a right, fully entitled to protection in the setting of this case.

### C. The Right to Choose Whether and When to Bear and Raise Children

In addition to the decisions upholding rights associated with personal and family privacy, an overlapping body of precedent extends significant constitutional protection to the citizen's sovereignty over his or her own body.

As early as 1891 this Court stated:

"No right is held more sacred, [n]or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.'" *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891), quoted in *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968).

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<sup>22</sup> See also *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Mr. Justice Harlan, dissenting):

"[T]he integrity of [family] life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

This right, like all rights, has limits, as illustrated by *Jacobson v. Massachusetts*, 197 U.S. 11 (1904). There this Court upheld a compulsory vaccination law, but only to avoid "great dangers" and to protect "the safety of the general public." 197 U.S. at 29. The lengths to which the Court went, however, to justify a shot in the arm point up the degree to which personal autonomy is entitled to protection.

In marital and family matters relating to procreation, this Court has consistently recognized and sustained the individual's rights, and has done so on a constitutional plane. "The freedom to marry . . .," *Loving v. Commonwealth*, 388 U.S. 1, 12 (1967); "the right to have offspring," *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942); and "the liberty of parents and guardians to direct the upbringing and education of children under their control," *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), are all protected constitutional rights, embedded in American law, as is the right, at least of a married woman, to use contraceptives.

These rights, however, do not complete the set. Without a right to respond, a woman is at the mercy of possible contraceptive failure, particularly if she is unable or unwilling to utilize the most effective contraceptives. When pregnancy begins, she is faced with a governmental mandate compelling her to serve as an incubator for months, and finally as an ostensibly willing mother for up to twenty or more years. Often she must forego a career or further education, and endure economic and social hardships. Under the present law she is given no other choice. Continued pregnancy is compulsory, unless she can persuade

the authorities that she is potentially suicidal, or that her "health" is otherwise endangered.

Without the right to obviate contraceptive failure, other rights of privacy or family rights would be largely diluted. For this reason this Court should take the same position as *California v. Belous*, and recognize the constitutional validity of the "fundamental right of the woman to choose whether to bear children . . . ." 71 Cal. 2d at 1005, 438 P.2d at 199, 80 Cal. Bptr. at 359.

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***The Distinction Between Personal and Economic Rights Under the Due Process Clause and the Relevance of the Ninth Amendment as an Aid to Construction:***

Appellee's position is by no means an assertion that courts ought "to roam at large in the broad expanses of policy and morals,"<sup>51</sup> nor that this Court should "sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."<sup>52</sup> Here, as in *Griswold*, the position is that there are certain sacred rights associated with individual privacy and the marital relation. These rights have already been held to include the rights to marry, have children, not have children (by use of contraceptives), and raise children. Appellee claims that these rights also include the right not to have children in the case where preg-

<sup>51</sup> *Adamson v. California*, 332 U.S. 46, 90 (1947) (dissenting opinion of Mr. Justice Black). See also *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting); *id.* at 527 (Stewart, J., dissenting); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

<sup>52</sup> *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1962).

nancy can be terminated in its early stages by means of an induced or therapeutic abortion. This is by no means a novel claim in light of the lines of decision discussed above.

Two distinctions can be made which limit the scope of the principle asserted: first, that there are constitutional justifications for treating "personal" rights differently from purely "economic" rights in cases arising under the due process clause, and second, that there are even weightier considerations for treating "privacy" and "marital" rights with great solicitude in order to protect these most important areas from legislative experimentation. *Griswold* recognized these distinctions. Writing for the majority Mr. Justice Douglas reaffirmed the proposition that the Court does not

"sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions." 381 U.S. at 482.

However, the Court recognized an important distinction where the challenged statute

"operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." 381 U.S. at 482.

That is precisely the type of situation presented by this case, and the kind of circumstance envisioned by the concurring opinion in *Griswold* by Mr. Justice Goldberg:

"I quite agree with Mr. Justice Brandeis that . . . 'a . . . State may . . . serve as a laboratory; and try novel social and economic experiments . . . ' I do not believe that this includes the power to experiment with the fundamental liberties of citizens . . ." 381 U.S. at 496.

It is apparent, moreover, that Justices Holmes, Brandeis, Stone, Jackson, Frankfurter, and Reed also took this position. They consistently rejected an economic due process approach, but joined in due process opinions which protected fundamental "personal" liberties. These have already been discussed at length.

In addition, there are more recent expressions which indicate a different standard for testing "legislation [which] touches upon fundamental individual and personal rights essential to maintaining the independence, integrity, and private development of a citizen in a highly organized, yet democratic society."<sup>22</sup> The several "right to travel" cases recognized a right which is nowhere spelled out in the Constitution or Bill of Rights,<sup>23</sup> as do decisions which broadly protect freedom of "association" far beyond the mere articulation of ideas and into the sphere of organized action.<sup>24</sup>

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<sup>22</sup> Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. L. Rev. 219, 224 (1965). Professor Emerson suggests that this "distinction is . . . a fundamental one," *id.*, and analyzes cases which can be explained on such a basis. E.g., *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

<sup>23</sup> E.g., *Aptheker*, *supra*; *Shapiro v. Thompson*, 394 U.S. 613 (1969); *United States v. Laub*, 385 U.S. 475 (1967); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Lynd v. Rusk*, 389 F.2d 940 (D.C. Cir. 1967); see *United States v. Guest*, 383 U.S. 745, 757-59 (1966) (Stewart, J.):

"The Constitutional right to travel . . . occupies a position fundamental to the concept of our Federal Union. . . . [T]hat right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be . . . necessary . . . . All have agreed that the right exists."

<sup>24</sup> See, e.g., *United Mine Workers v. Illinois State Bar*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 371 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

Principled justification, moreover, exists for making this distinction.<sup>22</sup> The Constitution grants plenary power to the legislative branch to regulate commerce and to levy taxes for the general welfare. It grants no such power to the courts for appraising economic legislation. On the other hand, the Constitution grants considerable power to the courts for the purpose of protecting certain basic human rights. And, the Constitution grants no such power to the legislative branch for the purpose of experimenting with basic human rights because these rights are to be protected rather than subjected to legislative regulation. It follows, therefore, in light of the due process clause and the Ninth Amendment (discussed below), that the judiciary is charged with the protection of those rights in the Bill of Rights and other non-economic fundamental rights which have not been enumerated, such as those associated with the relation and the family, particularly where *federal* governmental action is present, as here.

Significantly, the text of the Constitution does not prohibit the courts from protecting basic human rights which are not enumerated. The draftsmen of the Bill of Rights could certainly have used language to limit the courts to protecting only those rights which were specifically named. The very opposite was done, however, by the expansive language of "rights" "not enumerated," "privileges and immunities," and "due process of law." These

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<sup>22</sup>The personal-economic dichotomy is also suggested in *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring); Rostow, *The Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193, 215-24 (1952); cf. Tussman & ten Broek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 371-73 (1949) (similar dichotomy suggested for equal protection setting).

latter terms, moreover, were written against the background of Chief Justice Marshall's statement in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), that:

"We must never forget that it is a Constitution we are expounding . . . intended to endure for ages to come, and consequently to be adapted to the various crises in human affairs."

Similarly, Mr. Justice Brandeis wrote:

"Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world . . . . The progress of science in furnishing the Government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the Government . . . will be enabled to expose to a jury the most intimate occurrences of the home . . . . Can it be that the Constitution affords no protection against such invasions of individual security?"

*Olmstead v. United States*, 277 U.S. 438, 472, 474 (1928) (dissenting opinion).

Finally, what was said by Mr. Justice Stewart in a post-*Griswold* decision may be aptly paraphrased to apply in the present context:

"The Constitutional right [of marital privacy] . . . occupies a position fundamental to the concept of our Federal Union. \* \* \* [T]hat right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be . . . necessary . . . ."

*United States v. Guest*, 383 U.S. 745, 757-58 (1966). Can it be that a right of marital privacy, or personal privacy or



autonomy, occupies a lesser position than a right to travel from state to state?

One basic purpose of the first nine amendments could not have been to render the courts helpless in the face of government intrusion upon personal and marital privacy. What has been said concerning the due process clause and the distinction between personal and economic rights finds further support in the Ninth Amendment, as recognized in the *Griswold* concurrence by Mr. Justice Goldberg, Chief Justice Warren, and Justice Brennan.<sup>77</sup>

Justice Goldberg summarized his interpretation of the Ninth Amendment as follows:<sup>78</sup>

"I do not mean to imply that the Ninth Amendment is applied against the State by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the State or the Federal Govern-

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<sup>77</sup> Post- and pre-*Griswold* discussions of the Ninth Amendment have surveyed its history in the convention and the courts. They point to the accuracy of Mr. Justice Goldberg's interpretation, as contrasted with that of the dissents. See generally Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. Chi. L. Rev. 814 (1966); Franklin, *The Ninth Amendment*, 40 Tul. L. Rev. 487 (1966); Symposium—*Comments on the Griswold Case*, 64 Mich. L. Rev. 197, 207, 227-28, 254-55, 268-71 (1965); Redlich, *Are There "Certain Rights . . . Retained by the People?"*, 37 N.Y.U. L. Rev. 787 (1962).

<sup>78</sup> The Note cited above, 33 U. Chi. L. Rev. at 825, reaches the same conclusion after an exhaustive study of the Ninth Amendment:

"In summary, whether one reads the history of the ninth as foreclosing the 'imperfect enumeration' theory, or as attempting to avoid future definitional problems, the amendment clearly remains a rule of construction with the purpose of obviating the possibility of interpreting the first eight amendments as exclusive. It is not, as its history indicates, either a source or a summary of those unenumerated rights."



ment. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated and an intent that the list of rights included there not be deemed exhaustive." 381 U.S. at 492.

No specific constitutional provision covers the rights to marry, raise children, travel, attend private school, to dress as one chooses, to pursue one's chosen profession, or a host of rights which might someday be invaded by legislatures. The framers could hardly be expected to undertake the herculean task of listing all personal rights which might be regarded as of equal stature to those more specifically spelled out. Therefore, it appears, they enacted the Nine Amendment.

Recognition of the rights being asserted on this appeal would not usher in a vast increase in judicial power. What has been said pertaining to *Griswold* applies here:

"*Griswold v. Connecticut* is a reaffirmation of a power long exercised by the Court in protecting fundamental rights. It required no judicial roving at large to reach the conclusion that the freedom of the marital relationship is a part of the bundle of rights associated with home, family, and marriage—rights supported by precedent, history, and common understanding. For a court to find that these rights are fundamental, whether because they are deeply written in the tradition and conscience of our people, are part of the concept of ordered liberty, are implicit in the notion of a free society, or emanate from the totality of the constitutional order, involves no immodest or startling exercise of judicial power. The decision operates within a narrow sphere. In exercising its power in *Griswold*

to protect a fundamental personal liberty, the Court, far from advancing to a new milepost on the high road to judicial supremacy, was treading a worn and familiar path."

Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 Mich. L. Rev. 235, 258 (1965). And, as Professor Sutherland suggested, "[i]f anyone rebels at the thought of entrusting this power to the nine Justices, he may well consider for a little while to whom he would prefer to entrust it; this can be a sobering experience." Sutherland, *Privacy in Connecticut*, 64 Mich. L. Rev. 283, 288 (1965).

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Accepting, then, that Appellee, physicians similarly situated, and their patients are rightfully asserting fundamental rights of constitutional dimension, it is necessary to evaluate the competing interests of the government.

Two governing principles must be satisfied to sustain this statute: Its provisions must be (1) narrowly drawn, and (2) supported by compelling governmental interests. As outlined in the majority and concurring opinions in *Griswold*:

"a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' *NAACP v. Alabama*, 377 U.S. 288, 307." 381 U.S. at 485.

. . . . .

"In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing

that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' *Bates v. Little Rock*, 361 U.S. 516, 524." 381 U.S. at 497 (concurring opinion of Goldberg, J.).

#### D. Insufficiency of Governmental Interests

Whether the District's abortion statute, with its potentially drastic sweep, can be independently justified as promoting public health in 1970 is not even a close question. The statute clearly does not generate a more healthy female population. Rather, it creates "a public health problem of pandemic proportions"<sup>88</sup> by denying to women the opportunity to obtain safe medical treatment in controlling their personal reproduction.<sup>89</sup>

Although Appellants have not sought to support the statute as a compelling (or even rational) public health measure, this appears to be the principal justification ever brought forward for such laws.

All available evidence from the last century indicates that the dangers of abortifacient surgery, and no other consideration, provoked the statutes against abortion. In fact,

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<sup>88</sup> Hall, *Abortion in American Hospitals*, 57 Am. J. Pub. Health 1933, 1934 (1967).

<sup>89</sup> Some will contend that women themselves, not the statute, create their own public health quandries by refusing the role of compulsory motherhood and seeking non-medical abortion as a last resort. But that is a bootstrap contention which the State may not make. The statute itself must be said to create the health problems, for its very terms foreclose access to safe medical abortion in many if not most cases of pregnancy. As shall be shown, *infra*, medical abortion is safer than childbirth, and permissive abortion practices, of necessity, would enhance the public health, not the contrary.

a statute was proposed in New York in 1828 which would have criminally punished "any surgical operation . . . unless it appear that the same was necessary for the preservation of life . . . ." <sup>61</sup>

In 1828 all surgery which involved insertion of instruments into body cavities was highly dangerous because of uncontrollable infection and pain-induced shock. Abortion, which would have involved the insertion of unclean instruments into the uterine cavity, was accordingly a frightfully dangerous procedure at that time. It was 1884 before Sir Joseph Lister's aseptic techniques<sup>62</sup> gained widespread acceptance in New York City circles,<sup>63</sup> and only much later, 1934, before curettage was routinely used in hospital treatment of incomplete abortion.<sup>64</sup> Effective antibiotics came into use after 1942 to inaugurate a new era in medicine and surgery.<sup>65</sup>

Nineteenth century judicial commentary showed an acute awareness of the fact that surgical dangers underlay the

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<sup>61</sup> 6 Revisers' Notes, pt. IV, ch. 1 tit. 6, §28 at 75 (1828). See generally, Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968).

<sup>62</sup> Lister's findings first appeared in an 1867 issue of *The Lancet*. Earlier discoveries along the same lines had been made by Semmelweis and Oliver Wendell Holmes, Sr. See generally, Holmes, *The Contagiousness of Puerperal Fever* (1843); I. SEMMELWEIS, *THE AETIOLOGY, CONCEPT, AND PROPHYLAXIS OF CHILDBIRTH FEVER* (1861); H. ROBB, *ASEPTIC SURGICAL TECHNIQUE WITH ESPECIAL REFERENCE TO GYNAECOLOGICAL OPERATIONS* (1835); C. HAAGENSEN & W. LLOYD, *A HUNDRED YEARS OF MEDICINE* (1943).

<sup>63</sup> C. HAAGENSEN & W. LLOYD, *supra* note 62, at 292-93.

<sup>64</sup> Douglas, *Toxic Effects of the Welch Bacillus in Postabortal Infections*, 56 N.Y. State J. Med. 3673 (1956).

<sup>65</sup> *Id.*

statutes." A 1943 decision in the District reflected the same concern. *Williams v. United States*, 78 U.S. App. D.C. 147, 150, 138 F.2d 81, 84 (1943) ("The dangers of abortion . . . come from . . . incompetent, unscrupulous practitioners, operating in secrecy, without antiseptic conditions . . .").

In sum, the statute *when enacted* in 1901 was probably a useful public health measure. Today, almost 70 years later, the statute and its purpose remain virtually unchanged. It purports to protect the women, however, even from abortions performed in safe clinical facilities.

While abortion statutes lay on the books for years on end, the realm of surgery has undergone changes of profound magnitude.

Of special relevance to this appeal is the fact that clinical abortions today, in early pregnancy, are much safer than childbirth. Thus, the government's health interest in preventing abortion is not compelling; it is neither reasonable nor rational; it is wholly non-existent. The public health interest would be served greatly by permitting pregnant women to have abortions when they so desire, not by forcing them into more dangerous courses—pregnancy, or extra-clinical abortion.

Tietze published a study in September of 1969 which summarized the relevant data, as follows:

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<sup>22</sup> See *State v. Murphy*, 27 N.J.L. 112, 114-15 (Sup. Ct. 1858):

"The design of the statute was not to prevent the procuring of abortion, so much as to guard the health and life of the mother against the consequences of such attempts."

*State v. Gedicke*, 43 N.J.L. 86, 96 (Sup. Ct. 1881):

"[Abortion] in almost every case endangers the life and health of the woman."

*"Mortality associated with legal abortion performed in hospital, at an early stage of gestation: 3 deaths per 100,000 abortions . . . ."*<sup>67</sup>

. . . . .

*"Maternal Mortality from complications of, or associated with, pregnancy, child-birth, and the puerperium, excluding induced abortion: 20 deaths per 100,000 pregnancies."*<sup>68</sup>

. . . . .

*"Mortality associated with highly effective contraception: 3 deaths per 100,000 users per year . . . ."*<sup>69</sup>

Thus, abortion is almost seven times as safe as childbirth.

Yet, abortions are not freely available to most women who request them. The statute is generally interpreted by hospitals to prohibit abortion except in a narrow range of cases, a range which varies from physician to physician and hospital to hospital. The effect of these wide-ranging interpretations is to deny abortions to the poor, thus adding a gross factor of statutory discrimination to those hardships which the government is otherwise trying to correct.

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<sup>67</sup> Tietze, *Mortality With Contraception and Induced Abortion*, 45 Studies in Family Planning 6 (1969) (emphasis in original). For further substantiation of the safety of early abortion on healthy women under appropriate medical conditions, see Tietze, *Abortion Laws and Abortion Practices in Europe* (1969); Tietze, *Abortion in Europe*, 57 Am. J. Pub. Health 1923 (1967); Tietze & Lewit, *Abortion*, 220 Scientific American 3 (Jan. 1969); Kolblova, *Legal Abortion in Czechoslovakia*, 196 J.A.M.A. 371 (1966); Mehland, *Combatting Illegal Abortion in the Socialist Countries of Europe*, 13 World Med. J. 84 (1966).

<sup>68</sup> *Id.*, based on the United States "rate of maternal mortality, excluding abortion, [which] was 18 per 100,000 live births in 1964-66." *Id.*

<sup>69</sup> *Id.*, citing Inman & Vessey, *Investigation of Deaths from Pulmonary and Cerebral Thrombosis and Embolism in Women of Child-bearing Age*, 2 Brit. Med. J. 193 (1968). ✓

The statute as implemented, moreover, forces women to go elsewhere, often to non-medical practitioners who do not operate under conditions of safety. At worst they utilize coat-hangers and knitting needles.

The medical literature is replete with discussions of the public health dangers created by non-medical abortions.<sup>70</sup> The incidence of death from bungled abortion is no longer of startling magnitude.<sup>71</sup> However, severe infection and irreversible sterility occur with unfortunate frequency.<sup>72</sup>

One can fairly contend that this would all not be the case but for the inevitable effects of a vague and potentially sweeping statute.

Viewed in light of the constitutional mandate that a statute touching fundamental liberties must be narrowly drawn and supported by a compelling state interest, this

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<sup>70</sup> See, e.g., Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion*, 199 J.A.M.A. 805 (1967); Shensi, *Massive Removal of Small Bowel During Criminal Abortion*, 2 Brit. Med. J. 929 (1966); Decker & Hall, *Treatment of Abortion Infected With Clostridium Welchii*, 95 Am. J. Obst. & Gynec. 394 (1966); Moritz & Thompson, *Septic Abortion*, 95 Am. J. Obst. & Gynec. 46 (1966); Knapp, Platt & Douglas, *Septic Abortion*, 15 Obst. & Gynec. 344 (1960) (concerning experience at the New York Hospital); Studdiford & Douglas, *Placental Bacteremia: A Significant Finding in Septic Abortion Accompanied by Vascular Collapse*, 71 Am. J. Obst. & Gynec. 842 (1956) (Bellevue Hospital); Douglas, *Toxic Effects of the Welch Bacillus in Post-abortion Infections*, 56 N.Y. State J. Med. 3673 (1956).

<sup>71</sup> Earlier estimates were of 10,000 deaths per year. J. BATES & E. ZAWADZKI, *CRIMINAL ABORTION*, 3-4 (1964). With the advent of anti-biotics, however, 500-1,000 is a more reliable national estimate today. Hall, *Commentary in ABORTION AND THE LAW* 228 (D. Smith ed. 1967).

<sup>72</sup> See, e.g., S. KLEEGMAN & S. KAUFMAN, *INFERTILITY IN WOMEN* 301 (1966): "Induced illegal abortion . . . is one of the most important causes of subsequent infertility and pelvic disease."



statute cannot be sustained as a public health measure. It is not narrowly drawn to prohibit abortion by non-medical personnel outside of the clinical setting. Nor is there a compelling interest, or any health interest whatsoever, for prohibiting abortion in a medical facility. The operation, it should be recalled, excels its alternative, childbirth, many times over in terms of safety.

Congress also has neither a compelling nor rational basis for adopting a policy in favor of increased population."

Although Appellants have not strongly contended that the doctrine of "be fruitful and multiply" supports their position, abortion statutes have frequently throughout history been enacted for this very purpose. It is important to establish not only that increased population is not a compelling governmental interest, but also that increasing population, calmly viewed, is a major social problem in the nation, and the world.

The national population today is over 200 million," and that of the world is 3.2 billion."

"Looking ahead, it is estimated that the world population will double yet again by the end of this century, reaching a total of 6.4 billion in the short period of 30 years. Beyond that, the next doubling could take a mere 15 years."

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<sup>13</sup> Cf. Clark, p. 9: "Procreation is certainly no longer a legitimate or compelling state interest in these days of burgeoning populations."

<sup>14</sup> U.S. BUREAU OF THE CENSUS, *Statistical Abstract of the United States: 1969*, Table 11, at 12 (90th ed.).

<sup>15</sup> Rossi, *A Behavioral Scientist Looks at Abortion* in *ABORTION IN A CHANGING WORLD* (R. Hall ed. 1970) (in press).

<sup>16</sup> *Id.*



This geometrical growth rate of population poses

"tremendous problems of providing jobs, finding schools, and constructing livable urban environments for a population which is already in a mass movement to urban areas."<sup>11</sup>

"With this prospect ahead for the next few generations, it is scarcely surprising that so many writers view human fertility control as *the* problem of man in the late 20th century."<sup>12</sup>

This abortion statute intensifies the problem of population by largely excluding voluntary abortion as a means of regulating family size when contraception failed or was not used. Only when women have had this option has population growth *sua sponte* leveled-off to a small or negligible rate."<sup>13</sup>

In sum, the statute in question finds neither compelling nor rational justification in a governmental policy favoring increased population. Thus Congress has failed to put forward a compelling justification for the statute and it must be found to violate the United States Constitution.

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<sup>11</sup> Kaplan & Ches, *The Economics of Population Growth*, 103 Am. J. Obst. & Gynec. 133, 135 (1969).

<sup>12</sup> Rossi, *supra* note 75. The literature on the burgeoning population and its consequences is massive. See, e.g., P. EHRLICH, *THE POPULATION BOMB* (1968); W. THOMPSON & D. LEWIS, *POPULATION PROBLEMS* (1965); P. HAUSER (ed.), *THE POPULATION DILEMMA* (1963); Foerster, Mora & Amiot, *Doomsday: Friday, 23 November, A.D. 2026*, 132 Science 1291 (1960).

<sup>13</sup> See, Tietze, *Abortion Laws and Abortion Practices in Europe* (1969).

# CONCLUSION

For the reasons set out, the Motion to Affirm should be granted.

Respectfully submitted,

JOSEPH SITNICK  
1511 K Street, N.W.  
Washington, D. C. 20005

JOSEPH L. NELLIE  
1819 H Street, N.W.  
Washington, D. C. 20006

ROY LUCAS  
26 West 9th Street  
New York, N. Y. 10011

*Attorneys for Appellee.*

# **In the Supreme Court of the United States**

**OCTOBER TERM, 1969**

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**No. 1155**

**UNITED STATES OF AMERICA, APPELLANT**

**v.**

**MILAN VUITCH**

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA**

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## **SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES**

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The Court has requested counsel to consider the question whether, under the Criminal Appeals Act, 18 U.S.C. §731, this Court has jurisdiction to entertain a direct appeal from a decision of the United States District Court for the District of Columbia dismissing an indictment because of the invalidity of the statute on which the indictment was founded where the underlying statute is applicable only to the District of Columbia. We answer in the affirmative, on the basis of decisions of this Court and of the Court of Appeals for the District of Columbia Circuit.

(1)

Section 3731 provides in pertinent part:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity of the statute upon which the indictment or information is founded.

\* \* \* \* \*

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

1. Until 1907, the United States had no right of appeal in criminal cases tried in federal courts outside of the District of Columbia. See *United States v. Sanges*, 144 U.S. 310. To remedy this situation, a bill was introduced in the House of Representatives in 1906 adopting the language of § 935 of the District of Columbia Code of 1901, which had given the government "the same right of appeal that is given to the defendant." See H. Conf. Rep. No. 8113, 59th Cong., 2d Sess. The proposed legislation was designed to extend the "provision of the code of the District of Columbia to all districts in the United States," H. Rep.

No. 2119, 59th Cong., 1st Sess. 2. The final Criminal Appeals Act which emerged as law in 1907 rejected the District provision in favor of language restricting the government's right of appeal to narrowly defined instances and providing for a direct appeal to this Court from decisions of "district or circuit courts."<sup>1</sup>

In 1933, this Court held that the term "district court", as used in the Criminal Appeals Act, did not encompass the Supreme Court of the District of Columbia (the trial court of the District), notwithstanding a section in the District of Columbia Code providing that the Supreme Court of the District "shall possess the same powers and exercise the same jurisdiction as the district courts of the United States." *United States v. Burroughs*, 289 U.S. 159, 163. When the Criminal Appeals Act was amended in 1942 to provide for appeals to the circuit courts of appeals, specific reference was made to, and the same jurisdiction conferred upon, the "United States Court of Appeals for the District of Columbia." 56 Stat. 271. In the same statute, Congress included a separate provision giving the United States Court of Appeals for the District of Columbia power to review judgments of the (by then created) District Court of the United States for the District of Columbia in criminal cases on appeals taken by the United States "in cases where such appeals are permitted by law." 56 Stat. 272.<sup>2</sup>

<sup>1</sup> For a discussion of the legislative history of the Criminal Appeals Act, see *United States v. Carroll*, 354 U.S. 394, 402, fn. 11.

<sup>2</sup> Specific reference in the Criminal Appeals Act to the United States Court of Appeals for the District of Columbia was elim-

The legislative history of the 1942 amendment casts no light upon—indeed includes no discussion of—this aspect of the law which for the first time brought the United States District Court and Court of Appeals within the Criminal Appeals Act. Similarly there is no mention of any *limitation* on the jurisdiction conferred upon this Court when the appeal is from the dismissal of an indictment based upon the invalidity or construction of a local District of Columbia statute. On the contrary, it seems to have been assumed that the United States courts for the District of Columbia were not distinguishable from the other United States district and appellate courts insofar as appeals by the United States in criminal cases are concerned. See H. Rep. No. 45 and S. Rep. No. 868, 77th Cong., 1st Sess.; H. Conf. Rep. No. 2052, 77th Cong., 2d Sess. Indeed, it is now well settled that, since the 1942 amendments, the Criminal Appeals Act applies to decisions of the United States District Court of the District of Columbia. *United States v. Hoffman*, 161 F. 2d 881, 882-883 (C.A.D.C.), jurisdiction upheld on certification to this Court but judgment reversed on other grounds, 335 U.S. 77. See also *Carroll v. United States*, 354 U.S. 394, 411; *United States v. Bramblett*, 348 U.S. 503; *United States v. Waters*, 175 F. 2d 340 (C.A.D.C.).

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inated by an amendment in 1949, 63 Stat. 97, which altered the language of the statute to conform to the changed nomenclature of the courts (i.e., "courts of appeals" for "circuit courts." 62 Stat. 991; see also 63 Stat. 107, now 28 U.S.C. 451).

In *Carroll v. United States* this Court discussed at length the relationship between the Criminal Appeals Act and § 23-105 of the D.C. Code (the successor to § 935, cited above) and concluded that—

appeals by the Government in the District in Columbia are not limited to the categories set forth in 18 U.S.C. § 3731, although as to cases of the type covered by that special jurisdictional statute, its explicit directions will prevail over the general terms of [§ 23-105] \* \* \*. 354 U.S. at 411.

In cases not covered by § 3731, the limits of the government's right to appeal in the District of Columbia would be defined by the general criminal appeals statute, 28 U.S.C. 1291.

2. The question therefore is whether a judgment holding unconstitutional a statute applicable only to the District of Columbia is a "decision \* \* \* based upon the invalidity of the statute upon which the indictment \* \* \* is founded" within the purview of 18 U.S.C. 3731, in which case a direct appeal to this Court is proper. If, on the other hand, statutes applicable only to the District of Columbia do not fall within the quoted language, the appropriate appeal in this case is to the Court of Appeals for the District of Columbia under the third and fourth quoted paragraphs of § 3731, set forth on p. 2, *supra*.

An argument can be made, that as a matter of sound appellate policy, appeals involving the validity of District statutes should be taken in the first instance



to the Court of Appeals for the District of Columbia. Where the statutes are of local effect only, no issues of national policy are involved demanding the expeditious attention of this Court. Furthermore, this Court has on occasion deferred to decisions of the court of appeals based on interpretations of local District statutes or rules of law, see *Griffin v. United States*, 336 U.S. 704, 712-718, *District of Columbia v. Pace*, 320 U.S. 698, 702, *Del Vecchio v. Bowers*, 296 U.S. 280, 285, although this deferment policy has yielded where statutory interpretation questions are "so enmeshed with constitutional issues that complete disposition by this Court is in order." *District of Columbia v. Little*, 339 U.S. 1, 4, fn. 1. See also *Kent v. United States*, 383 U.S. 541, 557, fn. 27.

Overriding these policy considerations, however, is the literal language of § 3731 which certainly on its face includes statutes limited in operation to the District of Columbia. In *United States v. Waters*, 175 F. 2d 340, appeal dismissed on motion of the United States, 335 U.S. 869, the Court of Appeals for the District of Columbia certified a case involving the validity of a local District statute to this Court for direct review under § 3731, although the possibility that the direct review provisions of § 3731 might not be applicable was not adverted to.

A construction of the Criminal Appeals Act which would bar the appeal in this case would lead to anomalous consequences, in view of the separate provision in that Act allowing for direct appeals to the Supreme Court from the pre-jeopardy granting of a motion in



bar. While this Court has disagreed over the precise meaning to be given the term "motion in bar" (see *United States v. Mersky*, 361 U.S. 431; Brief for the United States in *United States v. Sisson*, No. 305, this Term, p. 24, fn. 7), all members of the Court are in agreement that it includes such things as rulings with respect to a statute of limitations, the privilege against self-incrimination, or speedy trial. Thus it would appear that a decision in the United States District Court for the District of Columbia dismissing a prosecution under a local statute upon the granting of a motion that another local statute fixing the period of limitations had not been complied with would be appealable directly to this Court, while (under the hypothetical interpretation we oppose) a ruling dismissing the case because of the *invalidity* of the statute alleged to have been violated by the defendant would not. See *United States v. Sweet*, No. 577, this Term, Statement Respecting Jurisdiction pending, where the United States Court of Appeals for the District of Columbia certified a case to this Court involving a prosecution under a local statute because, in its view, the trial judge's ruling dismissing the case was a motion in bar under the Criminal Appeals Act. It is unlikely that Congress intended to distinguish in this way between the two classes of decisions described.

While this Court has not dealt directly with the applicability of the Criminal Appeals Act to statutes of local application only, it has ruled that a constitutional challenge to an act of Congress applicable only to the District of Columbia must be heard by a three-

judge court under 28 U.S.C. 2282, which provides that an action to enjoin the operation of an "Act of Congress" must be considered by such a court. *Shapiro v. Thompson*, 394 U.S. 618, 625, fn. 4. Before that decision there had been some doubt as to whether this was a necessary construction of Section 2282. In *Ex parte Cogdell*, 342 U.S. 163, this Court had raised a question as to whether the three-judge statute governed where the act under attack applied only in the District of Columbia. Presumably, it was thought that the situation might be analogous to decisions under 28 U.S.C. 2281, holding that local ordinances and the like were not "statutes" of a state so as to require a three-judge court when constitutionality was challenged in an enforcement action. See *Moody v. Flowers*, 387 U.S. 97, 101, and earlier decisions there cited.<sup>3</sup> In *Shapiro v. Thompson*, however, the Court resolved the issue saying (394 U.S. at p. 625, fn. 4):

Section 2282 requires a three-judge court to hear a challenge to the constitutionality of "any Act of Congress." (Emphasis supplied.) We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia.<sup>4</sup>

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<sup>3</sup> In construing its jurisdiction under 28 U.S.C. 1254(2), 1257(1) and 1257(2), which allow appeals from decisions involving the constitutionality of "State statute[s]", "statute[s] of the United States" and "statute[s] of any state," respectively, this Court has consistently given those terms broad scope. See Stern & Gressman, *Supreme Court Practice*, pp. 31-34, 80-87 (4th ed. 1969).

<sup>4</sup> In *Berman v. Parker*, 348 U.S. 26, the Court had considered the constitutionality of a District of Columbia statute in an appeal under 28 U.S.C. 1253 from a decision of a three-judge court.

There is no more basis for reading an exception into the Criminal Appeals Act. Indeed, the term "statute" used here is arguably more broadly inclusive than "Act of Congress."<sup>2</sup> At all events, many criminal statutes of the United States have only limited territorial applications. *E.g.*, 18 U.S.C. 1111 and 1112, punishing homicide "[w]ithin the special maritime and territorial jurisdiction of the United States"; 18 U.S.C. 1151-1160, dealing with Indian territory. So long as Congress legislates for the District of Columbia and prosecutions under the D.C. Code are brought by the United States in the District Court of the United States for the District of Columbia, we see no basis on which a decision of the district court dismissing an indictment predicated on the construction or invalidity of what is undoubtedly a "statute" can be deemed outside the scope of the Criminal Appeals Act.

Respectfully submitted.

ERWIN N. GRISWOLD,  
*Solicitor General.*

WILL WILSON,  
*Assistant Attorney General.*

BEATRICE ROSENBERG,  
ROGER A. PAULEY,  
*Attorneys.*

APRIL 1970.

<sup>2</sup> Thus, the Criminal Appeals Act might authorize direct appeal to this Court of a judgment dismissing a criminal case for invalidity of a statute enacted by a local legislature if the prosecution were instituted by the United States in a United States district court. That procedure was not appropriate in *District of Columbia v. Thompson Co.*, 346 U.S. 100, because the prosecution in that case was initiated by the District government itself in its own municipal court.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1969

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No. ~~1450~~ 84  
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UNITED STATES OF AMERICA, *Appellant*,

v.

MILAN VUITCH, M.D., *Appellee*.

—  
On Appeal From the United States District Court for the  
District of Columbia  
—

**SUPPLEMENTAL MEMORANDUM OF APPELLEE**  
—

JOSEPH SITNICK  
1511 K Street, N. W.  
Washington, D. C. 20005

JOSEPH L. NELLIS  
1819 H Street, N. W.  
Washington, D. C. 20006

ROY LUCAS  
26 West 9th Street  
New York, N. Y. 10011

*Attorneys for Appellee.*



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1969

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No. 1155

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UNITED STATES OF AMERICA, *Appellant*,

v.

MILAN VUITCH, M.D., *Appellee*.

---

On Appeal From the United States District Court for the  
District of Columbia

---

**SUPPLEMENTAL MEMORANDUM OF APPELLEE**

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**PRELIMINARY STATEMENT**

This Supplemental Memorandum of Appellee is respectfully submitted in response to the Court's request of both parties to submit a memorandum as to whether the appeal provisions of Title 18 U.S.C. 3731 are applicable to the statute here involved (D.C. Code, Section 22-201, fully set forth at page 2, Appellee's Motion to Affirm) or whether the provisions of Title 18 U.S.C. 3731 apply only to a Federal enactment of general applicability.



**STATUTE INVOLVED**

Title 18 U.S.C. 3731 (as revised) provides: "**§ 3731.**  
*Appeal by United States*

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

\* \* \*

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States

which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court."

### **QUESTION PRESENTED**

Does this Court have jurisdiction to entertain a direct appeal from a decision of the United States District Court for the District of Columbia dismissing an indictment on the ground of the invalidity of the statute upon which the indictment is founded, where that statute, although an Act of Congress, applies only in the District of Columbia?

### **JURISDICTION OF THIS COURT**

#### **Legislative History**

The original Congressional enactment of which Section 3731 is the effective present law was a statute of March 2, 1907<sup>1</sup> and became Title 18, United States Code (1940 Ed.), Section 682. In 1949, Congress by its Act of May 24, 1949, substituted the word "invalidity" for the word "validity" following the words "upon the" in the second paragraph of Title 18

<sup>1</sup> C. 2564, *et seq.*

U.S.C., Section 3731. Certain other language, not relevant to this discussion, was conformed.

Construing Title 18 U.S.C. 682 this Court in 1933 reviewed the provisions of the present section in *United States v. Burroughs*,<sup>2</sup> and was faced with the question as to whether or not the Criminal Appeals Act encompassed cases triable in the former existing Supreme Court of the District of Columbia. This Court stated that in 1901 Congress adopted the D.C. Code and sanctioned appeals from the then Police Court and the then Supreme Court of the District of Columbia to the Court of Appeals for the District of Columbia.<sup>3</sup> Section 935 of that appellate D.C. statute, provided, *inter alia*, "in all criminal prosecutions, the United States or the District of Columbia . . . shall have the same right of appeal that is given to the defendant. . . ." In 1907, the Criminal Appeals Act was passed, authorizing an appeal by the United States from the United States District Court for the District of Columbia and the Court of Appeals directly to this Court "in all criminal cases" specified. This Court in the *Burroughs* case made clear that the 1907 Act superseded Section 935 of the D.C. Code, adding "we are of the opinion that the Criminal Appeals Act is inapplicable to criminal cases tried in the Supreme Court of the District of Columbia. These are regulated solely by Section 935 of the Code." Thus, in 1933, the law was that the former Supreme Court of the District of Columbia was not in legal effect a United States District Court and since the Criminal Appeals Act used the phrase "District Courts" and not "Courts of the United States" (the

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<sup>2</sup> 289 U.S. 159, 53 S. Ct. 574 (1933).

<sup>3</sup> 31 Stat. 1189, U.S.C., Chap. 854.

language used by the empowering Act creating the District of Columbia Supreme Court) the then United States Circuit Court of Appeals for the District of Columbia, had jurisdiction of appeals at that time.

However, in 1942, the Criminal Appeals Act was amended to specifically include the District of Columbia Court of Appeals as "in the opinion of such Court the appeal should have been taken directly to the United States Supreme Court." In its opinion in *United States v. Hoffman*,<sup>4</sup> the Court of Appeals for the District of Columbia Circuit stated "it was held in *United States v. Burroughs* that the Criminal Appeals Act did not apply to the District of Columbia." But the Act had been further amended in 1942 and under its present provisions appeals to the Supreme Court from "all" or "any" District Court decision "invalidating" a statute on constitutional grounds, as will more fully be seen below, are authorized. Section 128 of the Judicial Code, as amended,<sup>5</sup> gives this Court power to review judgments of the District Court in criminal cases on appeals taken by the United States "in cases where such appeals are permitted by law. This latter clause was part of the Act amending the Criminal Appeals Act in 1942, and clearly brings this Court within the terms of that amended statute" (*Hoffman, supra*). The Court of Appeals thus, in *Hoffman*, held that the appeal there involved should go directly to the Supreme Court as a result of this reasoning.

Except for the Omnibus Crime Control and Safe Streets Act of 1968, which made, *inter alia*, the sup-

<sup>4</sup> 82 U.S. App. D.C. 153, 161 F.2d 881 (1947).

<sup>5</sup> 56 Stat. 272, 28 U.S.C.A., Section 225(f).

pression of evidence reviewable by the Courts of Appeal, and in other respects not relevant here, Title 18 U.S.C. 3731 has not been amended.

A review of the legislative history of the Criminal Appeals Act demonstrates that former Title 18 U.S.C., Section 682, as construed in *United States v. Burroughs, supra*, yields to the United States as a party the right of appeal directly to this Court "from any decision or judgment of the District Court of the United States quashing, setting aside, or sustaining a demurrer to any indictment or any count thereof where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment was founded." The House of Representatives, Judiciary Committee, in commenting upon old Section 682 stated: \*

"This law will have the effect of permitting the Government to appeal in criminal cases to the circuit court of appeals from a decision or judgment of a district court quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information where the validity of the statute or construction of the statute upon which the indictment is founded is not involved. Under the existing law the only provision for appeal from a judgment of the court sustaining a demurrer to an indictment is in those cases in which the decision sustaining the indictment is based upon the validity of the statute or a construction of the statute.

The amendments to the existing law which this legislation will accomplish were recommended by the Attorney General.

It has been the practice in our criminal jurisprudence to surround the accused with many safe-

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\* H. Rep. No. 45, February 7, 1942.

guards. As a result of this practice the amendments proposed in this bill have not hitherto been enacted into law. These amendments may impose upon a defendant in a criminal case the burden of expense of contesting an appeal and the hardship of having an indictment or information outstanding against him. Nevertheless your committee feels that the Government should have the right to appeal to the circuit court of appeals from the district court from decisions on demurrers or pleas in abatement to indictments or informations in cases involving the sufficiency of the allegations in the indictments or informations in the same manner in which the Government may now appeal from decisions on demurrers to indictments direct to the Supreme Court in those cases involving the invalidity of a statute or the construction of a statute."

Thus, the legislative history of former Section 682 makes it abundantly clear it was the original intent of Congress to give the Government the same right of appeal in certain instances to the Circuit Courts of Appeal "in the same manner in which the Government may make appeal from decisions on demurrers to indictments direct to the Supreme Court in those cases involving the invalidity of a statute or the construction of a statute".

The language of the present Section 3731 is clearly unambiguous. Its effect is to treat the U.S. District Court for the District of Columbia as it does other, equally competent federal district courts. In the first paragraph, which provides for an appeal from the United States District Court directly to this Court, the language is "in *all* [emphasis supplied] criminal cases in the following instances". The word "all" on its face provides no exceptions for United States

District Courts in the District of Columbia as distinguished from United States District Courts in other jurisdictions.

Similarly, the second paragraph of Section 3731 provides for such appeal by the Government from a decision or judgment setting aside or dismissing "*any*" [emphasis supplied] indictment, where such a decision or judgment is based on the invalidity or construction of the statute on which the indictment is based. In the case at bar, it is clear from the Memorandum Opinion filed by United States District Judge Gesell<sup>7</sup> that 22 D.C. Code 201 was held to be unconstitutionally vague, and accordingly, Appellee's motion to dismiss the indictment in the District Court on the grounds of its unconstitutionality had been granted. A reading of that Opinion clearly demonstrates that it is "a decision or judgment . . . dismissing any indictment . . . where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

**Applicability of the Criminal Appeals Act to United States District Court for the District of Columbia**

While Section 3731 has been held by this Court to be strictly construed against the Government's right of appeal,<sup>8</sup> this Court has often held that as to "instances" specified in the statute, this Court has the jurisdiction to review a United States District Court decision or judgment that a Federal statute, such as the one at bar, is unconstitutional. Former Section

<sup>7</sup> App. A to Appellant's Jurisdictional Statement (pp. 9-15); 305 F. Supp. 1032 (D.D.C. 1969).

<sup>8</sup> *Will v. United States*, 389 U.S. 90, 88 S.Ct. 269 (1967).



682 did not apply to the District of Columbia or repeal the District of Columbia Appellate system, but Section 3731 has been construed to so apply.

The application of the Criminal Appeals Act, as has been noted, is strictly limited to the instances specified.<sup>9</sup> In *United States v. Borden Company*,<sup>10</sup> this Court helpfully summarized the general principles it will follow in exercising this jurisdiction under Section 3731:

1. "Appeal does not lie from a judgment which rests on the mere deficiency of the indictment as a pleading, as distinguished from the construction of a statute which underlies the indictment."<sup>11</sup> It is clear that in the case at bar the holding of the lower court was based solely upon the construction or invalidity placed upon 22 D.C. Code 201.

2. Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading "which is not subject to our examination. In that case, we cannot disturb the judgment and the question of construction becomes abstract." (*United States v. Borden, supra*). In the case at bar, it is clear that the District Court has not concerned itself with defects in pleadings but has held 22 D.C. Code 201 unconstitutional.

3. This Court "must accept the construction given to the indictment by the District Court as that . . .

<sup>9</sup> *United States v. Mersky*, 361 U.S. 431, 80 S.Ct. 459 (1960).

<sup>10</sup> 308 U.S. 188, 193, 60 S.Ct. 182 (1939).

<sup>11</sup> See also *United States v. Hastings*, 296 U.S. 188, 192-194, 56 S.Ct. 218 (1935).



matter we are not authorized to review." (*U.S. v. Borden, supra*).<sup>12</sup>

4. If the indictment does not allege a violation of the statute and such is found to be the case by the District Court "that is necessarily a construction of the statute." (*United States v. Borden, supra*).<sup>13</sup>

5. "When the District Court has rested its decision upon the construction of the underlying statute . . . this Court is not at liberty to . . . consider other objections to the indictment. The Government's appeal does not rest upon the whole case."<sup>14</sup>

*Carroll v. United States*<sup>15</sup> reviews the history of the Criminal Appeals Act as to appeals taken by the United States in the District of Columbia. In this case, this Court stated:

"It may be concluded, then, that even today criminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U.S.C. 3731, although as to cases of the type covered by that special jurisdictional statute, its explicit directions will prevail over the general terms of § 935, now found in the District of Columbia Code, 1951 Edition as § 23-105. *United States v. Hoffman*, 82 U.S. App. D.C.,

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<sup>12</sup> See also *United States v. Carbone*, 327 U.S. 633, 66 S.Ct. 734 (1946).

<sup>13</sup> See also *United States v. Southeastern Underwriters Association*, 322 U.S. 533, 164 S.Ct. 1162 (1944).

<sup>14</sup> *United States v. Petrillo*, 332 U.S. 1, 5, 67 S.Ct. 1538 (1947).

<sup>15</sup> 354 U.S. 394 (1957), 77 S.Ct. 1322 (1957).

53, 161 F. 2d 881, decided on merits, 335 U.S. 77."<sup>16</sup>

An appeal from a decision based on the invalidity or construction of the underlying statute, as here, is the result of a motion to dismiss the indictment made prior to trial. Thus, no verdict has been rendered in favor of either side. But if one had been rendered against the defendant, this appeal would not lie. The former statute, Section 682, made this point explicit by providing that the Government could not take an appeal in any case where there has been a verdict in favor of the defendant.<sup>17</sup>

In *United States v. Cefaratti* (91 U.S. App. D.C. 297, 202 F. 2d 13 (1952), cert. den. 345 U.S. 907, 73 S.Ct. 626, overruled in part by *Carroll v. United States*, *supra*) the United States Court of Appeals for the District of Columbia considered the question of an appeal by the Government from the granting of a motion to suppress by the United States District Court. It said, in part:

"it follows that, insofar as now material, the right of appeal of the United States is confirmed by the provision of the Federal Judicial Code that 'the Courts of Appeal shall have jurisdiction of

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<sup>16</sup> In *United States v. Waters*, 84 U.S. App. D.C. 127, 128-129, 175 F. 2d 340 (1948) the Court of Appeals for the District of Columbia stated that where a judgment of the United States District Court for the District of Columbia was "based upon the invalidity or construction of the statute upon which the indictment is founded" the Government must take its appeal directly to the Supreme Court". The offense here involved was a violation of D.C. Code (Supp. V 1946) Section 22-3204, not a federal statute of general applicability.

<sup>17</sup> *United States v. Weissman*, 266 U.S. 377, 45 S.Ct. 135 (1924).

appeals from all final decisions of the District Courts of the United States . . . except when a direct review may be had in the Supreme Court."

### CONCLUSION

There is nothing in the language of Title 18 U.S.C. 3731 nor in the legislative history of this statute to suggest that subsequent to the 1942 enactment, the United States does not have the right of direct appeal to the Supreme Court from a final decision of the United States District Court for the District of Columbia invalidating a Congressional enactment. Thus, we respectfully submit that the Court has jurisdiction of the present appeal, and should grant Appellee's Motion to Affirm.

Respectfully submitted,

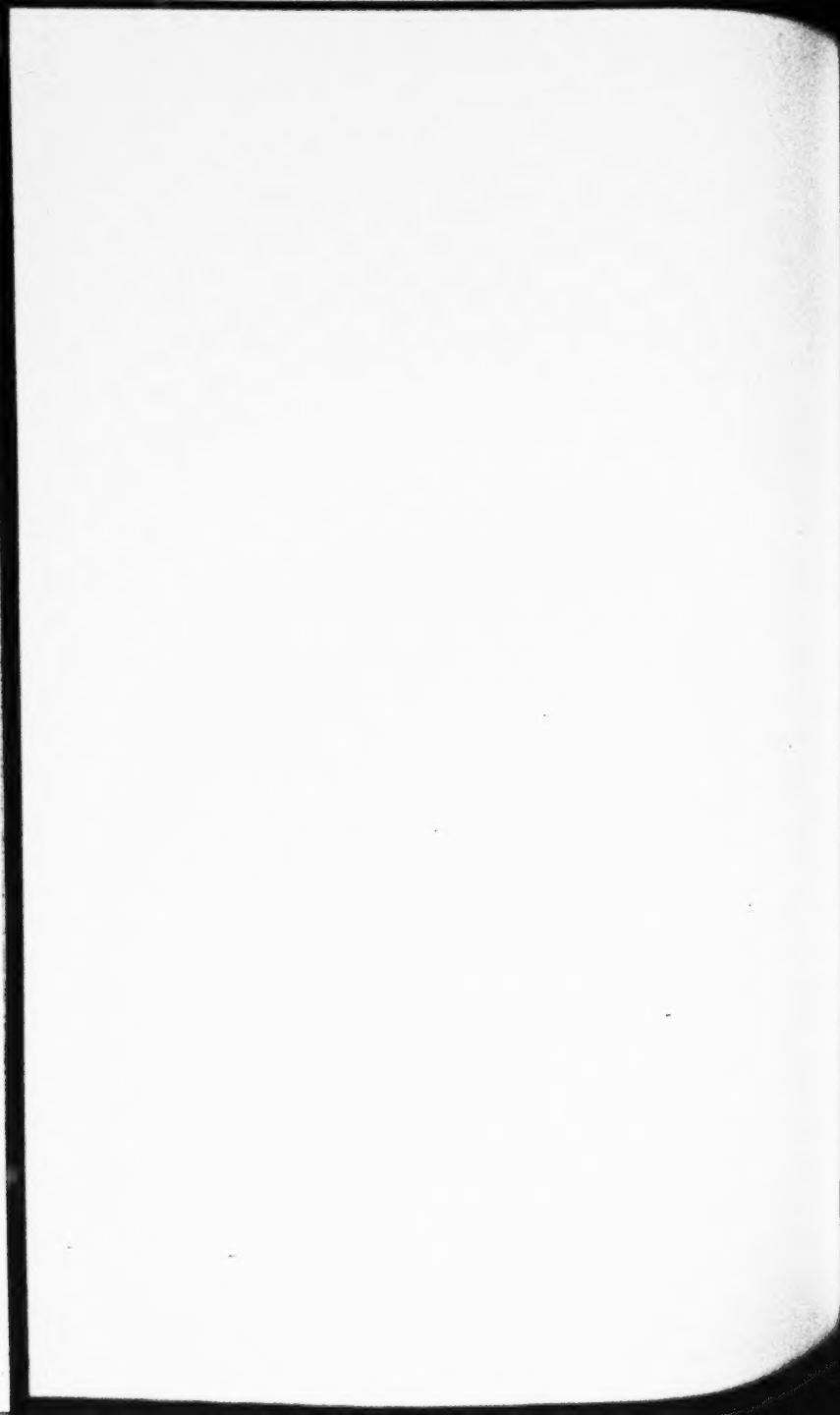
JOSEPH SITNICK

JOSEPH L. NELLIS

ROY LUCAS

*Attorneys for Appellee.*





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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1970.

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**No. \_\_\_\_\_**

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UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

MILAN VUITCH,

*Appellee.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA.

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**BRIEF AND APPENDICES OF DR. BART  
HEFFERNAN, AMICUS CURIAE IN  
SUPPORT OF APPELLANT.**

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**INTEREST OF THE AMICUS CURIAE.**

There is presently pending in the U. S. District Court for the Northern District of Illinois an action under the Declaratory Judgment Statute (28 USC 2281) seeking to have the Illinois statute on abortion declared unconstitutional.

Dr. Bart Heffernan has been appointed Guardian Ad Litem for the class of all unborn children in the State of Illinois who will be adversely affected by the abolition of the abortion statute in Illinois. His Petition to Intervene is

attached as Appendix A; the Order allowing intervention and appointing Dr. Heffernan Guardian Ad Litem for the class of all unborn children in the State of Illinois is attached as Appendix B.

It is the obligation of the Guardian Ad Litem to take all necessary action to secure the legal rights and redress the legal wrongs to his wards. The outcome of the instant case will profoundly affect his wards. The Federal Rules of Civil Procedure state: "The Court shall appoint a Guardian Ad Litem for an infant or incompetent person not otherwise represented in an action or it shall make such other order as it deems proper for the protection of the infant or incompetent person." (F. R. C. P., Rule 17(c)). Dr. Heffernan has received consent from all of the parties to file an Amicus Brief.

#### **STATUTE INVOLVED.**

D. C. Code Ann. § 22-201:

"Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; or if the death of the mother results therefrom, the person procuring or producing, or attempting to procure or produce the abortion or miscarriage shall be guilty of second degree murder. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 809; June 29, 1953, 67 Stat. 93, ch. 159, § 203.)"

### **SUMMARY OF ARGUMENT.**

Congress has as much power to prohibit or regulate abortion in the District of Columbia as do the state legislatures for their respective states. By D. C. Code 22-201, adopted in 1901 and readopted in 1953, Congress prohibited all abortions except those "done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." The provision requiring a licensed practitioner was for the protection of the mother against incompetent medical treatment. The provision "necessary for the preservation of the mother's life or health" was the balance struck by Congress between the interests of the mother in life or health, and that of the child in his continuing life.

By reason of inclusion of "health," the balance struck by Congress was more liberal toward the mother than that by the state legislatures. But Congress, like the legislatures, did prescribe a standard or scale of measurement of the relative rights of mother and child: life or health of the former against life of the latter. It thereby forbade indiscriminate or permissive destruction of the unborn, which is authorized under the decision below.

That decision distorts the law from one forbidding abortions except as narrowly limited, into one authorizing all abortions if they be done by physicians.

The minimal protection of the unborn, provided by Congress, is clearly within the competence of government. For centuries, the common law of property has treated the unborn child as an autonomous human being. Within the last several decades, the burgeoning scientific knowledge of the realities of fetal life, has worked a dramatic revolution in tort law: "The unborn child in the path of an

automobile is as much a person in the street as the mother." It has even been held that sacred constitutional rights of parents, *e.g.* free exercise of religion, must give way to the unborn's need for a blood transfusion. In other contexts, interests of the parents must be subordinated when they conflict with the unborn's interest in his continuing life. The state must withhold its penal sanction of execution while a woman carries a child.

This convergent development of property, tort, equity and constitutional principles has been the law's response to the scientific realities of life within the womb. As scientific certainty has increased, the law's protection has become more comprehensive, notably in the tort cases. Until the almost hysterical current clamor for completely permissive abortion, the law's progress had been constant, and roughly parallel to the increase in scientific certainty of the nature of the unborn. It would be a strange twist of values if government, which acknowledges all of these rights in the unborn, were held wholly helpless to protect them against direct destruction at the mere will of the mother.

The Solicitor General is demonstrating in his Brief that the concept used below thus to emasculate government—vagueness—cannot stand the test of this Court's teaching. On this point, we limit ourselves to arguing that the *Belous* case relied on below is insupportable.

The argument that any restriction on abortion invades marital privacy is fatuous. Of course a woman has the right to avoid the burden of pregnancy. But after pregnancy exists, the evolution of the law regarding women's rights encounters the evolution in scientific knowledge, that the unborn is a human person.

Human life is a continuum—all of it, fetal, infant, adolescent, mature or aged, is in the process of becoming. The

biological realities of fetal life, made apparent to all willing to read, by modern embryology, fetology, genetics and perinatology, are elucidated in some detail in the final pages of this Brief. They are summarized by H. M. I. Liley, M.D. in *Modern Motherhood*, pp. 26-27 (Rev. Ed. Random House, 1969):

"The head (of the fetus), housing the miraculous brain, is quite large in proportion to the remainder of the body, and the limbs are still relatively small. Within his watery world, however (where we have been able to observe him in his natural state through a sort of closed-circuit x-ray television set), he is quite beautiful, perfect in his fashion, active and graceful. He is neither a quiescent vegetable nor a witless tadpole, as some have conceived him to be in the past, but rather a tiny human being, as independent as though he were lying in a crib with a blanket wrapped around him instead of his mother."



## ARGUMENT.

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### I.

#### CONGRESS INTENDED TO PROTECT THE UNBORN CHILD AS WELL AS THE MOTHER.

##### A. The Authority of Congress.

Section 8 of Article I of the United States Constitution gives Congress power: "To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the Government in the United States . . ."

Dr. Vuitch challenged the exercise of that authority in the trial court which, in its opinion, referred to Congress' police power in passing the District of Columbia abortion statute. It is clear that Congress exercises over the District of Columbia at least all the legislative powers which a state may exercise over its affairs. *Berman v. Parker*, 348 U. S. 26, 31 (1954). See also *District of Columbia v. John R. Thompson Co.*, 346 U. S. 100, 108. In *Stoutenburgh v. Henrick*, 129 U. S. 141, 147, 9 S. Ct. 256, 257, 32 L. Ed. 637, it is said at page 638:

"Congress has express power 'to exercise exclusive legislation in all cases whatsoever' over the District of Columbia thus possessing the combined powers of a general and of a state government in all cases where legislation is possible."

## B. The Exercise by Congress of Its Authority Is Liberal to the Mother Compared to That of the Several States.

When passed in 1901, the District of Columbia statute on abortion (now D. C. Code Sec. 22-201) was substantially similar to most abortion statutes in the several states and territories, with the exception of the words "... or health ..." which then appeared *only* in the D. C. statute. *All* of the abortion statutes of the states and territories in 1901 absolutely prohibited or severely restricted abortion. Several absolutely prohibited it. Most prohibited it unless necessary to preserve (or save) the life of the mother, although there was occasional variation in the verbal formula. For example, Maryland proscribed abortion unless "... no other method will secure the safety of the mother." New Jersey prohibited abortions done "without lawful justification." Pennsylvania proscribed abortions done with the "unlawful" use of any instrument. In a few states, a necessity to save the child's life was an additional authorizing exception. See Quay, *Justifiable Abortion*, 49 Georgetown Law Journal, 395, 447-520 (1961).

When Congress passed the Law Enforcement Act of 1953 amending Section 22-201 of the D. C. Code to its present form, it made no substantive change in the prohibition of abortions. The law continued to prohibit them except "as necessary for the preservation of the mother's life or health" and when performed by a competent licensed practitioner of medicine. In 1953, almost all state statutes still prohibited abortions unless necessary for the preservation (or to save) the life of the mother. Apparently by this time only the District of Columbia and Alabama statutes contained the words "or health" as well as "life" in granting the exceptional protection to the mother. See Quay *Justifiable Abortion*, *supra*, at pp. 447, 456.

By prohibiting abortions except when necessary to pre-

serve the life of the mother, Congress did only what almost all American legislatures had done. True, by adding the words "... or health ..." Congress struck a balance, as between mother and unborn child, more favorable to the mother than that of the other American legislatures.

The significant thing is that in 1901 Congress prohibited all abortions except when performed by physicians and "when necessary for the preservation of the mother's life or health." This protection of the unborn\* was reconfirmed as recently as 1953. The decision below reverses the Congressional mandate, and makes permissible all abortions, without reference to any balance of interest between mother and child, provided only the abortion is performed by a physician. Obviously, Congressional intent has not so reversed itself, and the court's technique chosen to work the reversal is that the statutory words are unconstitutionally vague. To have stricken as vague only "... or health ..." would have made the District of Columbia law conform with the American norm, which prohibits abortions except when necessary to save the mother's life. But the Court below reached out to strike down the entire clause without analysis, invoking only *People v. Belous*, 71 Cal. 2d 996, 458 P. 2d 194, 80 Cal. Rptr. 354 (1969), the four to three California decision demonstrably lacking in historical accuracy. See Comment, *To Be or Not To Be: The Constitutional Question of the California Abortion Law*, 118 U. Pa. L. Rev. 643 (1970).\*\*

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\* Where the statute involved, as in the District of Columbia, makes no distinction between the quick and the unquickened fetus it is clear that the life revered under the statute is the fetus itself. See Means, *The Law of New York Concerning Abortion*, 14 New York L. Forum 411, 508 (1968). Means says: "The Common Law protected the quickened (but not the unquickened) fetus as a being with its own right to life, immune to destruction at maternal will." *Ibid.* p. 508.

\*\* The rationale of *Belous*, however imprecise historically, as a practical matter worked no serious judicial undermining of legislation because while that case was pending, the California legislature amended its abortion statute.

We later show that the exception "when necessary for the preservation of the mother's life or health" is the working norm of the American medical profession, understood and daily applied as a standard medical judgment. This leaves nothing—other than loose references below to rights of privacy and Fifth Amendment procedural safeguards—upon which to predicate the court's reversal of the legislative protection of the unborn.

### C. Congress and the Several States Created a Standard of Due Process and Equal Protection for the Unborn Child.

As noted, Congress has forbidden abortions except those necessary to preserve the life or health of the mother, when performed by licensed physicians. The requirement of a licensed physician was to safeguard the mother. Prohibition of *all* abortions, except those necessary to safeguard the life or health of the mother, was the standard to protect the rights of the unborn.\* It was the balance struck in measuring life against life—not a mere additional protection of the mother. *In effect, Congress enacted a minimal norm of due process and equal protection for the unborn by specifically forbidding killing them unless neces-*

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\* Many courts have held that the purpose of the abortion statutes are for the protection of both mother and child. *State v. Howard*, 32 Vt. 380 (1859); *State v. Hoover*, 252 N. C. 133, 113 S. E. 2d 281 (1960); "The statute defining abortion is designed to protect the life of the mother as well as the child", *Anderson v. Commonwealth*, 190 Va. 665, 58 S. E. 2d 72, 75 (1950); *State v. Siciliano*, 21 N. J. S. 249, 121 A. 2d 480, 495 (1956); *State v. Murphy*, 27 N. J. L. 112, 114 (Sup. Ct. 1858), *Mills v. Commonwealth*, 13 Pa. St. 630 (1850). Even where the statute involved says nothing concerning the pregnant woman's participation in the abortion other than as a seemingly consenting passive participant, some courts have held her guilty as an accessory to the crime. *State v. McCoy*, 52 OS 157, 39 N. E. 316 (Ohio Supreme Court 1894), Coke said that the pregnant woman herself committed a crime if she aborted a quickened fetus. 3 Coke, *Institutes* 50 (1648).

sary for the mother's life or health. The balance struck by Congress was liberal for the mother and restrictive for the unborn, vis-a-vis the usual American legislative standard. The decision below destroys all protection of the unborn, so that even whim can supersede the right to life.

There is nothing unusual, arbitrary or vague in Congress exercising its inherent legislative authority to protect the civil rights of the unborn. The progress of our law in recognition of the fetus as a person has been constant and roughly parallel to the growth of knowledge of biology, embryology, fetology, genetics and perinatology. Judge Gesell's opinion failed to examine the statute from the point of view of the unborn child. Yet the statute must be considered from both points of view: Those of the mother and the child. If Congress had intended to protect *only* the mother, then no *balancing* of rights between those of the unborn and the mother would have been necessary. Congress, from the mother's point of view, would have limited the statute to the requirement of performance by a competent medical man. By limiting even competent medical men to certain conditions (the health or life of the mother) Congress was saying that not all abortions are legal even when performed by competent medical men.

Turning to our law's evolving protection of the rights of the unborn in property, tort, constitutional and equity cases, it will be noted that long before modern biology's certain demonstration of the human qualities of the fetus, the English cases resolved scientific, as well as moral and philosophical, doubts in favor of the unborn.\*

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\* For a review of the development of the English and American criminal law in protection of the unborn, see Louisell and Noonan, *Constitutional Balance*, in *The Morality of Abortion* (Harvard Univ. Press, 1970); Quay, *Justifiable Abortion*, 49 *Georgetown L. J.* 395, 430 (1961); See also Means, *The Law of New York Concerning Abortion*, 14 *New York L. Forum* 411, 439 n. 64 (1968).

## II.

**PROPERTY RIGHTS OF THE UNBORN PERSON ARE  
PROTECTED BY LAW.**

For centuries, the English common law of property has recognized the unborn child as an autonomous human being. It has thus reflected a basic psychological evaluation that in law, as in ordinary thought, "child" includes the conceived but as yet unborn. In *Doe v. Clarke*, 2 H. Bl. 399, 126 Eng. Rep. 617 (1795) the court interpreted the ordinary meaning of "children" in a will to include a child in the womb: "An infant en ventre sa mere, who by the course and order of nature is then living, comes clearly within the description of 'children living at the time of his decease.'" In *Thelluson v. Woodford*, 4 Ves. 227, 31 Eng. Rep. 117 (1798) Buller, J. rejected the contention that this was a mere rule of construction invoked for the benefit of the child: "Why should not children en ventre sa mere be considered generally as in existence? They are entitled to all the privileges of other persons." (Ibid. at p. 323). To the argument that such a child was a nonentity he replied, at p. 322:

"Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian."

When the English property rules were adopted by American courts, the same approach was taken. In *Hall v. Hancock*, 15 Pick. 255 (Mass. 1834) the issue was whether a bequest to grandchildren "living at my decease" was valid and the court was asked to say that "in esse" was not the same as "living" and that for a child to be "living" the

mother must be at least "quick." Chief Justice Shaw held that a conceived child fell within the meaning of the language and quoted with approval Lord Hardwicke in *Wallis v. Hodson*, 2 Atk. 117: "The principal reason I go upon is, that a child *en ventre sa mere* is a person in *rerum natura*, so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in the father's lifetime."

The path of Anglo-American common law has been followed by statute. For example, California Probate Code, Sec. 250 provides that "A posthumous child is considered as living at the death of the parent." Cal. Probate Code, Sec. 255, amended as recently as 1961, provides that an illegitimate child is the heir of his mother, whether the child is "born or conceived."

The approach of the courts is not a Pickwickian one, making what is not in nature something in law. It has not been a sentimental concession to the supposed benefit of some forgotten posthumous child. The rule has been applied even where the application benefited some third party, *Barnett v. Pinkston*, 238 Ala. 327, 191 So. 371 (1939) and even where the child himself has been injured by the rule, *In re Sankey's Estate*, 199 Cal. 391, 249 P. 517 (1926) (where a child conceived but not born was held bound by a decree entered against the living heirs).

These property cases established two propositions: First, the ordinary person when he uses "children" in a will means to designate by the term children those who are conceived but not yet out of the womb. This interpretation has, to our knowledge, never been criticized as fanciful or arbitrary or imposed by a court in the service of some theological scheme; it has been generally accepted as a fair interpretation of the ordinary use of language and of

the ordinary person's notion of who are "children." Second, the child in the womb has property rights if there is a will, trust or intestate disposition leaving property to a class of living persons within which he falls.

From these propositions we argue that Congress may properly defend those whom ordinary language designates as "children" and Congress may properly prevent the unregulated extinction of those who may possess property. It would indeed be a strange inversion of values if it were the crime of embezzlement for a parent or guardian to filch an unborn child's income but no crime at all to destroy the recipient of that income.

### III.

#### RIGHTS OF THE UNBORN PERSON ARE NOW PROTECTED BY TORT LAW.

In the area of tort law, a *dramatic change* has occurred in the status of the unborn. Well into the twentieth century most American decisions denied recovery in tort to the human offspring harmed in the womb. The denial was based in part on the danger of fraudulent claims, in part on the difficulty of proving causation, but principally on the ground that "the defendant was not in existence at the time of his action," *Prosser on Torts* (3rd Ed. 1964), Sec. 56. The theory followed was that succinctly expressed by Justice Holmes in *Dietrich v. Northhampton*, 138 Mass. 14, at p. 17 (1884): "The unborn child was a part of the mother at the time of the injury."

In *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P. 2d 678 (1939), petition for rehearing denied, 93 P. 2d 562 (1939) the court held that a child might sue for injury to her in delivery before birth. The Court observed:

"The respondent asserts that the provisions of Section 29 of the Civil Code are based on a fiction of law



to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding."

The District of Columbia did not lag far behind. *Bonbrest v. Kotz*, 65 F. Supp. 138 (D. D. C. 1946). Since 1946, the California and District of Columbia approach has become general:

" . . . [A] series of more than thirty cases, many of them expressly overruling prior holdings, have brought about the most spectacular abrupt reversal of a well-settled rule in the whole history of the law of torts." *Prosser on Torts*, *supra*, p. 355.

As another writer puts it:

"The battle in jurisprudence is almost over. The development of the infant's right of action has illustrated the inherent capacity of legal systems to adjust to new situations." Gordon, *The Unborn Plaintiff*, 63 Mich. L. Rev. at 627 (1965).

For a time there was hesitation as to whether recovery must be restricted to a child who was "viable" or, whether alternatively, that at least the mother be "quick" at the time of the injury.\* But the majority of courts have imposed no such limitation on the right to recover, *Prosser on*

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\* At the common law the unquickened fetus was not considered alive. In 4 *Blackstone, Commentaries on the Laws of England* (concerning reprieves) 394-95 (1769) it is said: . . . "and if they bring in their verdict "quick with child" (for barely, "with child," unless it be alive in the womb, it not sufficient)." In other words, "with child" was not sufficient to stay execution of a pregnant felon because the fetus was not considered to be alive; whereas "quick with child" was sufficient to stay execution since the fetus was alive and the law would not take the lives of two people where only one had committed the crime. Blackstone also said: "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 *Blackstone* 124 (1769).

*Torts*, Sec. 56. "Viability" of a fetus is not a constant but depends on the anatomical and functional development of the particular baby, Morison, *Fetal and Neonatal Pathology*, 99-100 (1963). The weight and length of the fetus are better guides than age to the state of fetal development but weight and length vary with the individual, Gruenwald, *Growth of the Human Fetus*, 94 *American Journal of Obstetrics and Gynecology*, 1112 (1966). Moreover, different racial groups have different ages at which their fetuses are viable. Some evidence, for example, suggests that Negro fetuses mature more quickly than white fetuses, Morison, *Fetal and Neonatal Pathology*, at 101. Viability can also depend on the environment to which the fetus is delivered, as has been demonstrated clinically with animals, Brinster and Thomson, *Development of Eight-Cell Mouse Embryos in Vitro*, 42 *Experimental Cell Research* 308 (1966). There seems no reason to condition the rights of a fetus on such a shifting and uncertain standard, no reason to draw a line based on age or size within the womb. As Prosser observes at Sec. 56, "Certainly, the infant may be no less injured, and all logic is in favor of ignoring the stage at which it occurs."

As to actions for wrongful death resulting from negligent injuries to the unborn, the situation on a national basis is complicated by the varying provisions of the state wrongful death statutes. One question has been whether an unborn child is a "person" within the meaning of the controlling statute. A majority of courts passing on this question have answered "Yes" even when the child was stillborn. See 15 A. L. R. 3d 922 (1967). This includes the Third and Fourth Circuits, *Gullborg v. Rizzo*, 331 F. 2d 557 (3rd 1964; Penn. Statute); *Todd v. Sandidge Construction Co.*, 341 F. 2d 75 (1964; South Carolina Statute).

Ohio's acknowledgement of the humanity of the fetus is explicitly deduced from its constitution. *Williams v. Marion*

*Rapid Transit*, 152 Ohio 114, 87 N. E. 2d 334 (1949); *Stidman v. Ashmore*, 109 O. App. 431, 11 Ohio Ops. 2d 383, 167 N. E. 2d 106 (Ohio App. 1959).

The dean of authorities on tort law notes that all writers on the subject have maintained "that the unborn child in the path of an automobile is as much as person in the street as the mother," *Prosser on Torts*, Sec. 56. Can such a child become less a person when, instead of an automobile, another agency is directed to his destruction?

The tort development summarized above is taken as a prime example of the effect of scientific development on law in the instructive book of Edwin W. Patterson of Columbia University Law School entitled *Law in a Scientific Age* (1963). He concludes at p. 35 "that the meaning and scope of even such a basic term as 'legal person' can be modified by reason of changes in scientific facts—the unborn child has been recognized as a legal person, even in the law of torts."

#### IV.

#### **THE RIGHT OF THE UNBORN PERSON TO LIFE HAS BEEN PROTECTED AND PREFERRED BY LAW OVER CERTAIN CONSTITUTIONAL RIGHTS OF THE PARENTS AND OVER INTERESTS OF THE STATE.**

Despite the precedents of property and tort law recognizing the rights of the unborn, it might be argued that the law does not accord this recognition where the interests of the unborn clash with those of his parents. Such modern law, however, as has developed in this unusual area is to the contrary. Where the life of the unborn child is in balance with some lesser interest of the parent, the child has been preferred.

One type of case has arisen through the advances of medicine in the science of fetology. Techniques have been developed since 1963 to make lifesaving transfusions of

who have developed acute anemia in the blood to fetuses the incompatibility of the fetus' blood with womb because of blood. Liley, *Modern Motherhood*, Random House, p. 48 (1969).

House, p. 48 (1969) interest between fetus and parent has

A conflict of the parent by religious conviction has occurred where to permit a blood transfusion. In *Raleigh Memorial Hospital v. Anderson*, 42 N. J. 421, 201 A. 2d 537 (1964) cert. denied 377 U. S. 985, 12 L. ed. 2d 1032, 84 S. Ct. 1894 (1964), the mother refused for religious reasons to have blood transfusions which had been diagnosed as medically necessary to save her unborn child's life. At page 538 the New Jersey Supreme Court said:

"We are satisfied that the unborn child is entitled to the protection and that an appropriate order should be made to ensure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time."

The life of the unborn child was treated as a value outweighing even the sacred constitutional right to freely exercise one's religion. See also *Hoener v. Bertinato*, 67 N. J. Super., 517, 171 A. 2d 140 (1961).

Elsewhere the choice between the interests of the unborn and the civil rights of the parent have been presented in a different context. For example, in *Kyne v. Kyne*, 38 C. A. 2d 122, 100 P. 2d 806 (1st District 1940), the issue was whether a father might be compelled to support a fetus conceived by him. A suit seeking support was begun by the fetus' guardian ad litem when the fetus was less than six months old. The court applied California Civil Code, Section 196a providing that "The father as well as the mother of an illegitimate child must give him support and education suitable to his circumstances." The court held

that Section 29 of the Civil Code "must be read together with Section 196a so as to confer the right of an unborn child through a guardian ad litem to compel the right to support conferred by the code." The state has a compelling interest in the welfare of its children whether born or unborn which supersedes even constitutional rights of the parents. *Prince v. Massachusetts*, 321 U. S. 158, 166, 64 S. Ct. 438, 88 L. ed. 645 (1944); *State v. Perricone*, 37 N. J. 463, 181 A. 2d 751 (1962) *cert. denied* 371 U. S. 890, 83 Sup. Ct. 189, 9 L. ed. 124 (1962); *People ex rel. Wallace v. Labrenze*, 411 Ill. 618, 104 N. E. 2d 769 (1952).

Historically, the law has recognized the inviolability of the unborn child by providing for suspension of execution of pregnant women under death sentence, at least when "quick." 1 W. Blackstone, *Commentaries* 456 (W. Jones ed. at 561, 1916); 2 M. Hale, *Pleas of the Crown* 413-14 (1st Am. ed. at 412-13, 1847). This solicitude continues in modern statutes without regard to the state of pregnancy, *e.g.* California Penal Code, Secs. 3705-06 (West 1954).

It would be strange if an unborn child had rights to support from his parents, rights enforceable by a guardian and sanctioned by the criminal law of neglect, rights even paramount to constitutional rights of his parents, and yet have no right to be protected from an abortion. It would be incongruous that an unborn child should be protected by the state from wilful harm by a parent when the injury was inflicted indirectly but not when it was inflicted directly.

In these several ways, then, the law has found a recognizable locus of human rights in the unborn child from conception. It would be hard to pretend that this convergent development of property, tort, welfare and constitutional law was at the dictate of a hidden and impermissible theological impulse. The legislatures, the judges, the commentators have responded to what they found in reality

in the life within the womb. Such sturdy guardians of secular good sense as Justice Buller and Chief Justice Shaw did not invent some imaginary being when they said that the unborn child could have rights of inheritance. Such a perspicacious moulder of the best modern trends in tort as Dean Prosser did not indulge in metaphysical fancy when he found all commentators treating a fetus in the womb on a par with the mother in the path of an automobile.

That the American approach is not some national aberration is testified to by the action taken by the United Nations. In 1959 the United Nations adopted a "Declaration of the Rights of the Child" which supplemented the United Nations' statement entitled the "Universal Declaration of Human Rights." One reason for this supplementary declaration was stated in its Preamble as being because "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth," General Assembly of the United Nations, "Declaration of the Rights of the Child," adopted unanimously in the plenary meeting on November 20, 1959 (*Official Records of the General Assembly*, 14th Session, pp. 19-20). Thus the representatives of most of the nations of the world recognized that the unborn deserved recognition as children and were entitled to legal protection.

If the unborn child can inherit by will and by intestacy, be the beneficiary of a trust, be tortiously injured, be represented by a guardian seeking present support from the parent, be preferred to the religious liberties of the parent, be protected by the criminal statutes on parental neglect, *a fortiori* Congress may guard that unborn child from intentional extinction.

## V.

**RECOGNIZED RIGHTS OF MARITAL PRIVACY ARE NOT  
INCONSISTENT WITH THE CONGRESSIONAL PROTEC-  
TION OF RIGHTS OF THE UNBORN.**

There is an interest of husband and wife to preserve their conjugal relations from state interference, *Griswold v. Connecticut*, 381 U. S. 479, 85 Sup. Ct. 1678, 14 L. Ed. 2d 510 (1965). D. C. Code Section 22-201 does not affect the sexual relations of husband and wife. Pregnancy does not interfere with these relations except under some circumstances at limited times; indeed some women are more desirous of intercourse in pregnancy, Guttmacher, *Pregnancy and Birth*, p. 86 (paperback ed. 1960). Control of abortion does not entail state interference with the right of marital intercourse. Nor does enforcement of the statute require invasion of the conjugal bedroom.

Assuming, *arguendo*, that there are other marital rights which the state must respect, may it then be urged that one of these rights is the freedom of a married couple not to have, raise and educate a child they do not want? Certainly from the viewpoint of both the parents and the child it is important that the child be wanted. But the parents' attitude toward their offspring cannot be made the single criterion of that offspring's right to continue in existence.

In this area there has been a gradual evolution of civilized thought. In the Roman Republic the father by virtue of the *patria potestas* had the literal power of life or death over his children, Biondi, *La Patria Potestas, Il Diritto Romano Cristiano* (1954), Vol. 3, p. 13. "Within the family the paterfamilias enjoyed a lifetime despotism," Budkland and McNair, *Roman Law and Common Law*, p. 35 (1936). In the Roman Empire this freedom to deal with one's chil-



dren as one pleased was limited by the state. Infanticide, however, was still widely practiced and abortion with the consent of the father was legal, Noonan, *Contraception*, Belknap Press of Harvard U. Press, Cambridge, p. 113 (1965). The basic concept of the law was that a fetus was "a part of the woman," Justinian, *Digest* 25.4.1.1. No protection was accorded to this being within the womb, and the law only guarded the father's right to determine this being's destiny.

It was only as the boundaries of the modern Western European nations began to be formed that laws were adopted protecting the fetus. In England, only the "animated or formed" fetus was protected, Bracton, *De legibus et consuetudinibus Angliae* 3.2.4, commentators have construed this to mean quickened. 3 Coke Institutes 50 (1648). It was not until 1803 that English criminal law, following the judicial lead given in the property cases, safeguarded the fetus at all stages of existence by a criminal sanction, 43 Geo. III c. 58. In the nineteenth century the American states followed the English precedent, Bishop, *Commentaries on the Law of Statutory Crimes*, Sec. 746 (2d Ed. 1883). See also Means, *The Law of New York Concerning Abortion*, 14 New York L. Forum 411, 419-422 (1968).\*

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\* Coke said that the pregnant woman herself was guilty of a crime if she aborted a quickened fetus. 3 Coke, *Institutes* 50 (1648). There is much confusion as to whether or not the crime was murder. Coke says it was murder if the child be born alive, and then died. However, if the quickened fetus was stillborn then Coke called it a great misprison. Some commentators translate this as a misdemeanor, but penalties were severe even for a great misprison, e.g. loss of a hand and confusion as to the meaning of a great misprison at Coke's time exists. See Holdsworth, *History of English Law*, 389 n. 1 (3d ed. 1923). On the other hand, Hawkins said that abortion in ancient times of a quickened fetus was murder without regard to the distinction made by Coke as to whether or not the fetus must be born alive before it dies. Hawkins, *Pleas of the Crown*, Vol. 1 p. 121 (1788). Hawkins, among others, cited Bracton. The California supreme court recently dealt with this problem (*Keeler v. Superior Court of Amador*



Thus over a period of about 2500 years there has been built up a defense by the state in behalf of children, born and unborn, against the aggressive and the proprietary instincts of their progenitors. The problem of the "battered child" today is evidence, if evidence is needed, that the state must still by law restrain the freedom of conduct of parents toward their children, see

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*County, Doe. 7853 dec. 6-12-70*) and decided that the California legislature meant in 1850 that the fetus must be born alive, live for a short time, and then die before the act which was the cause could be termed murder.

Bracton in the thirteenth century said that abortion of a formed or animated fetus was homicide. Bracton, *The Laws and Customs of England* III, ii, 4, Woodbine ed. 1968 p. 341. Plunkett in *Concise History of the Common Law* at pp. 444-446 says that in Bracton's time if the defenses of misadventure and self-defense were not present, then there was but one case and that was homicide (which explains why Bracton called abortion of an animated fetus homicide). The distinction of degrees of homicide, such as murder and manslaughter, did not occur until well into the fifteenth century.

Lord Ellenborough's Act, the first English statute on abortion, cured the confusion by making abortion before quickening a felony also but with less penalty. For abortion after quickening the penalty was death; before quickening the penalty was transportation up to fourteen years, whipping, the pillory, imprisonment, etc. 43 Geo. 3, C58 (1803). However, abortion laws are as old as written legal history. See Quay, *Justifiable Abortion* 49 *Georgetown Law Review* 173 (1961) 395, 399-406. One must not forget that by 1803 whatever co-extensive jurisdiction the ecclesiastical courts of England once held in this area had vanished, but nonetheless Bracton's distinctions between animated and non-animated, which followed Aristotle, have continued to plague our courts under the guise of quickened or non-quickened, and more frequently today viable or unviable.

Such distinctions built on the uncertain meaning of a single paragraph of a thirteenth century Englishman writing in Latin (Bracton), and misunderstood by a seventeenth century commentator (Coke), cannot do justice to 500 years of early English common law history on this subject. Bracton, Coke, Hawkins, Blackstone, et al., based their legal conclusions on the science of Aristotle, who went medically unchallenged regarding animation until the sixteenth century. This Court should rely on the science of today (see Section VII of this brief) rather than the science of the Fourth Century B. C.

Kempe et al., *The Battered-Child Syndrome*, 181 American Medical Association Journal 17 (1962).

Prior to the seventeenth century the prevailing doctrine had been that of Aristotle that 40 days after conception the fetus underwent a transformation which put him in the human class. This notion was successfully attacked in 1621 as medical nonsense by Paolo Zacchia in his *Quaestiones Medico-Legales* 9.1. Thereafter the medical profession gradually accepted the view that there was no valid line to be drawn within the womb, and the law slowly followed the medical lead.

Today there can scarcely be a return to the Roman law theory that a parent has absolute dominion over his offspring or a return to the ancient notion that a fetus is "part" of his mother. As we show in Point VII, *infra*, the autonomy of the unborn child is established clearly by modern fetology. In the light of this evolution of legal thought and medical knowledge, it would indeed be to turn back the clock to hold that fetal life might be terminated whenever unwanted by the parents.

*A fortiori* the same considerations apply to the argument that a woman has a right to destroy any fetus of her own that she, in the most literal sense, finds "unbearable." This contention of a right to an abortion vested in a woman has, of course, no constitutional precedent, and it blandly ignores the joint responsibility and interest of a male partner in any conception. Yet this contention may be the emotional heart of the almost hysterical attack upon the abortion statutes.

The claim of freedom over one's body is, of course, a self-evident right, if it means that a woman should be free to refuse sexual intercourse or free to practice contraception. A woman is not under the necessity of subjecting her body to the burden of pregnancy if she chooses either

of these alternatives. But the further claim that a woman is free to destroy the being whom she has conceived by voluntarily having sexual intercourse makes sense only if that being can be regarded as part of herself, a part which she may discard for her own good. *But at this point, the evolution of women's rights encounters the evolution favoring the recognition of the fetus as a living person within the womb*, an evolution supported by the data of science and the precedents of property, torts, constitutional and welfare law.

## VI.

### **THE DISTRICT OF COLUMBIA ABORTION STATUTE IS NOT UNCONSTITUTIONALLY VAGUE.**

The opinion below strikes down as unconstitutionally vague D. C. Code 22-201's clause "... necessary for the preservation of the mother's life or health ..." although that has been in the law since 1901, and was re-adopted in 1953. Reliance below on *People v. Belous*, 71 Cal. 2d 996, 458 P. 2d 194, 80 Cal. Rep. 354 (1969) rests on a weak reed indeed.

The *Belous* majority, in fact, found the new California standard ("substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother." Cal. Health and Welfare Code 25951(c)(1)) to be a medical standard "... and the assessment does not involve considerations beyond medical competence" (458 P. 2d at 205). The substantial similarity between the new California standard and the D. C. standard attacked below indicates that reliance on *Belous* was misplaced.

The statutory language must be so vague that it fails to give warning to the particular defendants charged with crime under the law. "Vagueness" is essentially objec-

tionable because it is unfair. If a given defendant knows perfectly well that what he is doing under the statute is a crime, he may be convicted under it, even though some hypothetical case could be imagined where someone could genuinely be in doubt about the legality of his conduct. *State of Missouri v. Mucie*, ..... Mo. ...., 448 S. W. 2d 879, 886 (1970). This reasoning has recently been applied in upholding an abortion statute where it was contended that the statutory exception of "lawful justification" was vague. *State v. Moretti*, 52 N. J. 182, 244 A. 2d 499 (1968) cert. denied 393 U. S. 952 (1968). In general, it may be said that the persons customarily charged with the crime of abortion—persons operating secretly in out-of-the-way, non-hospital locales—are fully aware that their behavior is condemned by the usual statute. No reputable physician seems to have been prosecuted for performing an abortion in a reputable hospital. Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, *infra*, f.n. p. 749. To the same effect is the case of *Kudish v. Board of Registration in Medicine*, ..... Mass. ...., 248 N. E. 2d 264 (1969) where the Supreme Court of Massachusetts held that the word "unlawfully" in the abortion statute was not vague in light of prior decisions by that Court. Both the *Moretti* and *Kudish* cases were decided about the same time as *Belous*, but neither received the wide publicity of that case. It is difficult to believe that what is comprehensible to ordinary men in Massachusetts and New Jersey is not comprehensible to ordinary men in California or the District of Columbia.

## VII.

**THE UNBORN OFFSPRING OF HUMAN PARENTS IS AN  
AUTONOMOUS HUMAN BEING.**

Stripped to their essentials, attacks such as that below are premised on the unarticulated assumption that the unborn are only "tissue of the mother" and hence disposable at her will.\* The historic need of balancing right against right is thus banished from contemplation. Rare indeed are those candid enough to argue that in this modern era, society must have power to direct life-death decisions. Such candor would expose too bluntly the threatening "*Brave New World*." Instead, the argument is couched in such euphemistic verbiage as "terminating pregnancy" or similar sophistry.

But language, however clever, cannot forever conceal meaning. Human life is a continuum,\*\* and if those at one end can be exterminated, why not those at the other? All human life, whether fetal, infant, adolescent, mature or

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\* See Lucas, Roy, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, North Carolina L. Rev. 46:730 (1967-68), an article marred by an opening sentence which indicates the distortion of fact (Lucas says 10,000 American women a year die from criminal abortions) with which the abortion controversy is being waged in the United States. Even those who opt for completely permissive abortion have agreed (at the Harvard Divinity School International Conference on Abortion) that the maximum number of deaths by illegal abortion in the United States is 250 to 500 per year (250 to 500 per year too many we may add, but one should at least base conclusions upon correct data). See *The Terrible Choice: The Abortion Dilemma*, Bantam Books, at p. 43 (1968).

\*\* "The program of the [Institute of Child Health and Human Development] will give major attention to the study of the continuing process of growth and development that characterize all biological life—from reproduction to prenatal development through infancy and childhood and on into the stages of maturation and aging." Senate Report No. 2174, Institute of Child Health and Human Development (Sept. 27, 1962), Committee on Labor and Public Welfare.

aged, is in the process of becoming. It is our task in the next subsections to show how clearly and conclusively modern science—embryology, fetology, genetics, perinatology, all of biology—establishes the essential humanity of the unborn child. We submit that the data not only shows the constitutionality of the Congressional effort to save the unborn from indiscriminate extermination, *but in fact suggests a duty to do so*. We submit also that no physician who understands this will argue that the law is vague for he will understand that the law calls upon him to exercise his art for the benefit of his two patients: mother and child. As Dr. Liley has said:

“Another medical fallacy that modern obstetrics discards is the idea that the pregnant woman can be treated as a patient alone. No problem in fetal health or disease can any longer be considered in isolation. At the very least two people are involved, the mother and her child.” Liley, H. M. I., *Modern Motherhood*, Random House, Rev. Ed. (1969), p. 207.

#### A. The Unborn Person Is Also a Patient.\*

From conception the child is a complex dynamic rapidly growing organism. By the end of the first month, the child completes the period of relatively greatest size increase and the greatest physical change of a lifetime. The month old child is 10,000 times larger than the fertilized egg and will increase its weight six billion times by birth (1)(4). (See Fig. 1.)

By the end of the seventh week, we see a well proportioned small scale baby. In its seventh week, it bears the familiar external features and all the internal organs of the adult, even though it is less than an inch long and

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\* In this section and the section which follows, citations are according to medical journal practices. The numbers in parenthesis refer to the correspondingly numbered work in the Bibliography.

weighs only 1/30th of an ounce. The body has become nicely rounded, padded with muscles and covered by a thin skin. The arms are only as long as printed exclamation marks, and have hands with fingers and thumbs. The slower growing legs have recognizable knees, ankles and toes (2)(4). (See Figs. 2 and 3.)

The new body not only exists, it also functions. The brain in configuration is already like the adult brain and sends out impulses that coordinates the function of the other organs. The brain waves have been noted at 43 days (3). The heart beats sturdily. The stomach produces digestive juices. The liver manufactures blood cells and the kidney begins to function by extracting uric acid from the child's blood (4)(40). The muscles of the arms and body can already be set in motion (5).

From this point until adulthood, when full growth is achieved somewhere between 25 and 27 years, the changes in the body will be mainly in dimension and in gradual refinement of the working parts (1)(37).

The development of the child, while very rapid, is also very specific. The genetic pattern set down in the first day of life instructs the development of a specific anatomy. The ears are formed by seven weeks and are specific, and may resemble a family pattern (6). The lines in the hands start to be engraved by eight weeks and remain a distinctive feature of the individual (36)(40). (See Fig. 3.)

The primitive skeletal system has completely developed by the end of six weeks (1)(2). This marks the end of the child's embryonic (from Greek, to swell or teem within) period. From this point, the child will be called a fetus (Latin, young one or offspring) (2). (See Fig. 4.)

In the third month, the child becomes very active. By the end of the month he can kick his legs, turn his feet, curl and fan his toes, make a fist, move his thumb, bend his



wrist, turn his head, squint, frown, open his mouth, press his lips tightly together (5). He can swallow and drink the amniotic fluid that surrounds him. Thumb sucking is first noted at this age. The first respiratory motions move fluid in and out of his lungs with inhaling and exhaling respiratory movements (4)(5). (See Fig. 8.)

The movement of the child has been recorded at this early stage by placing delicate shock recording devices on the mother's abdomen and direct observations have been made by the famous embryologist, Davenport Hooker, M.D. Over the last thirty years, Dr. Hooker has recorded the movement of the child on film, some as early as six weeks of age. His films show that pre-natal behavior develops in an orderly progression (5)(7)(8).

The pre-requisites for motion are muscles and nerves. In the sixth to seventh weeks, nerves and muscles work together for the first time (1). If the area of the lips, the first to become sensitive to touch, is gently stroked, the child responds by bending the upper body to one side and making a quick backward motion with his arms. This is called a total pattern response because it involves most of the body, rather than a local part. Localized and more appropriate reactions such as swallowing follow in the third month. By the beginning of the ninth week, the baby moves spontaneously without being touched. Sometimes his whole body swings back and forth for a few moments. By eight and a half weeks the eyelids and the palms of the hands become sensitive to touch. If the eyelid is stroked, the child squints. On stroking the palm, the fingers close into a small fist. (7) (5) (4) (55).

In the ninth and tenth weeks, the child's activity leaps ahead. Now if the forehead is touched, he may turn his head away and pucker up his brow and frown. He now has full use of his arms and can bend the elbow and wrist in-



dependently. In the same week, the entire body becomes sensitive to touch. (7) (5) (See Fig. 4.)

The twelfth weeks brings a whole new range of responses. The baby can now move his thumb in opposition to his fingers. He now swallows regularly. He can pull up his upper lip; the initial step in the development of the sucking reflex. (33) By the end of the twelfth week, the quality of muscular response is altered. It is no longer marionette-like or mechanical—the movements are now graceful and fluid, as they are in the new born. The child is active and the reflexes are becoming more vigorous. *All this is before the mother feels any movement.* (33) (55) (See Fig. 5.)

The phenomenon of "quickening" reflects maternal sensitivity and not fetal competence.\* Dr. Hooker states that fetal activity occurs at a very early age normally in utero and some women may feel it as early as thirteen weeks. Others feel very little as late as twenty weeks and some are always anxious because they do not perceive movement. (7)

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\* If the court is interested in the actual medical history, of nineteenth century legislative opposition to abortion, it may consult the American Medical Association, *1846-1951 Digest of Official Actions* (edited F. J. L. Blasingame 1959), p. 66, where a list of the repeated American Medical Association attacks on abortion are compiled. It will be seen that the great medical battle of the nineteenth century was to persuade legislatures to eliminate the requirement of quickening and to condemn abortion from conception, see Isaac M. Quimby *Introduction to Medical Jurisprudence*, Journal of American Medical Association, August 6, 1887, Vol. 9, p. 164 and H. C. Markham *Foeticide and Its Prevention*, *ibid.* Dec. 8, 1888, Vol. 11, p. 805. It will be seen that the Association unanimously condemned abortion as the destruction of "human life", American Medical Association, *Minutes of the Annual Meeting 1859*, The American Medical Gazette 1859, Vol. 10, p. 409.

Dr. Liley sta

"Historical notes:

the time when 'quickening' was supposed to delineate being possible when the fetus became an independent human that while possessed of a soul. Now, however, we know motions felt he may have been too small to make his long before it, the unborn baby is active and independent ternal sense his mother feels him. Quickening is a maternal position of sensitivity and depends on the mother's own fat, of the unborn child." (33 at pp. 37, 38)

Every child born child." (33 at pp. 37, 38)

by the end of the first trimester (12th week) the fetus is a sentient moving being. We need not pause to speculate as to the nature of his psychic attributes but we may assert that the organization of his psychosomatic self is now well under way." (40)

Dr. Arnold (4) (3) (40) (See Fig. 5)

alignment of the muscles varies from baby to baby. The muscles of the face, for example, follow a pattern. The facial expressions of the baby in the third month are already similar to the facial expressions of his parents.

Further refinement of the psychosomatic self is now well under way." (40)

finger nails appear. His eyes, previously closed, are now open. The eyelids appear. The child's face becomes much prettier. The eyelids are previously far apart, now move closer together. primitive egg cells are formed. Sexual differentiation is completed. Both internal and external sex organs, and sound; the chi and sperm are formed. The vocal cords are capable of cry. In the absence of air they cannot produce sound.

Dr. Liley relates the experience of a doctor who injected an air bubble into an unborn baby's (eight months) amniotic sac in an attempt to locate the placenta on x-ray. It so

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Dr. Liley relates the experience of a doctor who injected an air bubble into an unborn baby's (eight months) amniotic sac in an attempt to locate the placenta on x-ray. It so

happened that the air bubble covered the unborn baby's face. The moment the unborn child had air to inhale, his vocal cords became operative and his crying became audible to all present including the physician and technical help. The mother telephoned the doctor later to report that whenever she lay down to sleep, the air bubble got over the unborn baby's face and he was crying so loudly he was keeping both her and her husband awake (33 at p. 50).

The taste buds and salivary glands develop in this month, as do the digestive glands in the stomach. When the baby swallows amniotic fluid, its contents are utilized by the child. The child starts to urinate. (1) (4) (2).

From the twelfth to the sixteenth week, the child grows very rapidly. (41) His weight increases six times, and he grows to eight to ten inches in height. For this incredible growth spurt the child needs oxygen and food. This he receives from his mother through the placental attachment—much like he receives food from her after he is born. His dependence does not end with expulsion into the external environment. (1) (2) (4). We now know that the placenta belongs to the baby not the mother as was long thought. (33) (See Fig. 6).

In the fifth month, the baby gains two inches in height and ten ounces in weight. By the end of the month he will be about one foot tall and will weigh one pound. Fine baby hair begins to grow on his eyebrows and on his head and a fringe of eyelashes appear. Most of the skeleton hardens. The baby's muscles become much stronger, and as the child becomes larger, his mother finally perceives his many activities. (1) The child's mother comes to recognize the movement and can feel the baby's head, arms and legs. She may even perceive a rhythmic jolting movement—fifteen to thirty per minute. This is due to the child hiccupping. (4) The doctor can now hear the heart-beat with his stethoscope. (1) (4) (See Figs. 8, 9).

The baby sleeps and wakes just as it will after birth. (54) When he sleeps he invariably settles into his favorite position called his "lie." Each baby has a characteristic lie. When he awakens he moves about freely in the bouyant fluid turning from side to side, and frequently head over heel. Sometimes his head will be up and sometimes it will be down. He may sometimes be aroused from sleep by external vibrations. He may wake up from a loud tap on the tub when his mother is taking a bath. A loud concert or the vibrations of a washing machine may also stir him into activity. (4) The child hears and recognizes his mother's voice before birth. (9) (10) Movements of the mother whether locomotive cardiac or respiratory are communicated to the child. (9)

In the sixth month, the baby will grow about two more inches, to become fourteen inches tall. He will also begin to accumulate a little fat under his skin and will increase his weight to a pound and three-quarters. This month the permanent teeth buds come in high in the gums behind the milk teeth. Now his closed eyelids will open and close, and his eyes look up, down and sideways. Dr. Liley of New Zealand feels that the child may perceive light through the abdominal wall. (10) Dr. Still has noted that electroencephalographic waves have been obtained in forty-three to forty-five day old fetuses, and so conscious experience is possible after this date. (3)

In the sixth month, the child develops a strong muscular grip with his hands. He also starts to breathe regularly and can maintain respiratory response for twenty-four hours if born prematurely. He may even have a slim chance of surviving in an incubator. The youngest children known to survive were between twenty to twenty-five weeks old. (4) The concept of *viability* is not a static one. Dr. Andre Hellegers of Georgetown University states that

10% of children born between twenty weeks and twenty-four week gestation will survive (35 A and 35 B). Modern medical intensive therapy has salvaged many children that would have been considered non viable only a few years ago. The concept of an artificial placenta may be a reality in the near future and will push the date of viability back even further and perhaps to the earliest stages of gestation. (34) (39) After 24 to 28 weeks the child's chances of survival are much greater.

Our review has covered the first six months of life. By this time, the individuality of this human being is clear to all unbiased observers. Dr. Arnold Gesell has said:

"Our own repeated observation of a large group of fetal infants [an individual born and living at any time prior to 40 weeks gestation] left us with no doubt that psychologically they were individuals. Just as no two looked alike, so no two behaved precisely alike. One was impassive when another was alert. Even among the youngest there were discernable differences in vividness, reactivity and responsiveness. These were genuine individual differences, already prophetic of the diversity which distinguishes the human family." (40 at p. 172)

## B. The Doctor Treats the Unborn Just as he Does Any Patient.

When one views the present state of medical science, we find that the artificial distinction between born and unborn has vanished. As Dr. Liley says:

"In assessing fetal health, the doctor now watches changes in maternal function very carefully, for he has learned that it is actually the mother who is a passive carrier, while the fetus is very largely in charge of the pregnancy." (33 at p. 202) (56)

The new specialty of fetology is being replaced by a newer specialty called perinatology which cares for its patients from conception to about one year of extrauterine existence. (47) The Cumulative Index Medicus for 1969 contains over 1400 separate articles in fetology. For the physician, the life process is a continuous one, and observation of the patient must start at the earliest period of life. (See 42 U. S. C. 289(d))

A large number of sophisticated tools have been developed that now allow the physician to observe and measure the child's reactions from as early as ten weeks. At ten weeks it is possible to obtain the electrocardiogram of the unborn child. (12) At this stage also the heart sounds can be detected with new ultrasonic techniques. (45) The heart has already been pumping large volumes of blood to the fast growing child for six weeks. With present day technology, the heart of the child is now monitored during critical periods of the pregnancy by special electronic devices, including radiotelemetry. (13) (51) Computer analysis of the child's ECG has been devised and promises more accurate monitoring and evaluation of fetal distress. (14) A number of abnormal electrocardiographic patterns have been found before birth. These patterns forewarn the physician of trouble after delivery. (48) (49) (53) Analysis of heart sounds through phonocardiography is also being done. (15) (44)

With the new optical equipment, a physician can now look at the amniotic fluid through the cervical canal and predict life-threatening problems that are reflected by a change in the fluid's color and turbidity. (16) (17) In the future, the physician will undoubtedly be able to look directly at the growing child using new fiber optic devices (through a small puncture in the uterus) and thereby diagnose and prescribe specific treatment to heal or prevent illness or deformity. (11) (46)

For the child with severe anemia, the physician now gives blood, using an unusual technique developed by Dr. A. Liley of New Zealand. This life saving measure is carried out by using new image intensifier x-ray equipment. A needle is placed through the abdominal wall of the mother and into the abdominal cavity of the child. For this procedure the child must be sedated (via maternal circulation) and given pain relieving medication, since it experiences pain from the puncture and would move away from the needle if not premedicated. As Dr. H. M. I. Liley states:

“When doctors first began invading the sanctuary of the womb, they did not know that the unborn baby would react to pain in the same fashion as a child would. But they soon learned that he would. By no means a ‘vegetable’ as he has so often been pictured, the unborn knows perfectly well when he has been hurt, and he will protest it just as violently as would a baby lying in a crib.” (33 at p. 50)

The gastro-intestinal tract of the child is outlined by a contrast media that was previously placed in the amniotic fluid and then swallowed by the child. (43) We know that the child starts to swallow as early as fourteen weeks. (33)

Some children fail to get adequate nutrition when in utero. This problem can be predicted by measuring the amount of estradiol in the urine of the mother and the amount of PSP excreted after it is injected into the child. (19) Recent work indicates that these nutritional problems may be solved by feeding the child more directly by introducing nutrients into the amniotic fluid which the child normally swallows (250 to 700 cc a day). In a sense, we well may be able to offer the child that is starving because of a placental defect a nipple to use before birth. (20)

The amniotic fluid surrounding the unborn child offers the physician a convenient and assessable fluid that he can now test in order to diagnose a long list of diseases, just



as he tests the urine and blood of his adult patients. The doctor observes the color and volume of amniotic fluid and tests it for cellular element enzymes and other chemicals. He can tell the sex of his patient and gets a more precise idea of the exact age of the child from this fluid. He can diagnose conditions such as the adrenogenital syndrome, hemolytic anemia, adrenal insufficiency, congenital hyperanemia and glycogen storage disease. Some of these, and hopefully in the future, all of these can be treated before birth. (21) (22) (23) (24) (25) (26) (27)

At the time of labor, the child's blood can be obtained from scalp veins and the exact chemical balance determined before birth. These determinations have saved many children who would not have been considered in need of therapy had these tests not been done. (28) (29) The fetal EEG has also been monitored during delivery. (52)

A great deal of work has been done to elucidate the endocrinology of the unborn child. Growth hormone is elaborated by the child at seventy-one days and ACTH has been isolated at eleven weeks gestation. (30) The thyroid gland has been shown to function at ten and a half weeks (42), and the adrenal glands also at about this age. (30) The sex hormones—estrogen and androgen—are also found as early as nine weeks. (30)

Surgical procedures performed on the unborn child are few. However, surgical cannulation of the blood vessels in an extremity of the child has been carried out in order to administer blood. Techniques are now being developed on animals that will be applicable to human problems involving the unborn child. Fetal surgery is now a reality in the animal laboratory, and will soon offer help to unborn patients. (18) (31) (32)

The whole thrust of medicine is in support of the notion that the child in its mother is a distinct individual in need



of the most diligent study and care, and that he is also a patient whom science and medicine treats just as it does any other person. (11) (33)

This review of the current medical status of the unborn serves us several purposes. Firstly, it shows conclusively the humanity of the fetus by showing that human life is a continuum which commences in the womb. There is no magic in birth. The child is as much a child in those several days before birth as he is those several days after. The maturation process, commenced in the womb, continues through the post-natal period, infancy, adolescence, maturity and old age. Dr. Arnold Gesell points out in his famous book that no king ever had any other beginning than have had all of us in our mother's womb. (40) Who among us would assume the awesome power of life and death over these little ones that the trial court below has by its opinion left to the whim—even the sacred sorrows—of the mother?

Secondly, we have proven that quickening is a relative concept which depends upon the sensitivity of the mother, the position of the placenta, and the size of the child. At the common law, the fetus was considered not to be alive before quickening\* and therefore we can understand why commentators like Bracton and Coke placed so much emphasis on animation and quickening. But modern science has proven conclusively that any law based upon quickening is based upon shifting sands—a subjective standard even different among races. We now know that life preceeds quickening; that quickening is nothing other than

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\* See 4 Blackstone, *Commentaries on the Laws of England*, 394-95 (1769) where it is said:

“In case this plea is made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact, and if they bring in their verdict ‘quick with child’ (for barely, ‘with child,’ unless it be alive in the womb, is not sufficient, . . . ).”

the mother's first subjective feeling of movement in the womb. Yet the fetus we know has moved before this. In spite of these advances in medicine, some court and legislatures have continued to consider quickening as the point when life is magically infused into the unborn. (See *Bobbitt v. Mc Cann*, U. S. D. C. Ed. Wis. #69-C-548). No concept could be further from the scientific truth.

Thirdly, we have seen that viability is also a flexible standard which changes with the advance of these new medical disciplines some of which are hardly a half dozen years old. New studies in artificial placentas indicate that viability will become an even more relative concept and children will survive outside of the womb at even earlier ages than the 20-28 weeks in the past. Fetology, and perinatology are only a few years old as specialties. Obstetrics is only sixty years old as a specialty. (33)

Fourthly, we have seen that the unborn child is as much a patient as is the mother. This most important but simple truth is not recognized in the trial court's opinion. In fact, in all the literature one reads opting for permissive abortion, this simple truth is ignored. There are many doctors in this nation who know that the unborn is also their patient and that they must exercise their art for the benefit of both mother and child. How then will they respond to a request for abortion on the most permissive grounds? How will they respond to a demand on the most permissive grounds? What is the next step? Must they respond to a law suit compelling them to perform an abortion? When the physician accepts that he has two patients he will have no difficulty in the exercise of his art for the benefit of child and mother. He will not find the liberal standard (necessary to preserve the life or health of the mother) to be vague because he will take the life of the child only for grave reasons even under this liberal standard.

This standard is not vague because that is the self same standard by which the doctor judges every act of his art. What doctor gives any medical treatment unless necessary to preserve life or health? Then what is the mystery or the vagueness about the standard when applied to preserve the life of the child? Certainly there is nothing vague about dispensing an aspirin for a headache or penicillin for infection. The doctor dispenses them to his patients when it is necessary to preserve their life or health. Then what is so vague about this one area—the most important area—where the action of the doctor means the weighing of one life over another? Every doctor practicing can tell this court when in his medical judgment an abortion is necessary to preserve life or health. There is no medical mystery on that point. A review of the relevant Obstetrics texts will list the indications—psychiatric as well—for therapeutic abortion.\* When the doctor makes the decision

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\* See Quay, *Justifiable Abortion*, 49 Georgetown Law Journal 173, 1960, pp. 180-241 where the medical reasons for therapeutic abortions as stated in the standard obstetric works from 1903 to 1960 are stated and analyzed.

Dr. Guttmacher has stated:

"On the whole, the over-all frequency of therapeutic abortion is on the decline. This is due to two facts: first, cures have been discovered for a number of conditions which previously could be cured only by termination of pregnancy; and second, there has been a change in medical philosophy. Two decades ago, the accepted attitude of the physician was that, if a pregnant woman were ill, the thing to do would be to rid her of her pregnancy. Today, it is felt that unless the pregnancy itself intensifies the illness, nothing is accomplished by the abortion." (57 at p. 13) See also (58)

Dr. Guttmacher has also said:

"Today it is possible for almost any patient to be brought through pregnancy alive, unless she suffers from a fatal illness such as cancer or leukemia and if so, abortion would be unlikely to prolong, much less save life." (59 at p. 9)

Dr. Guttmacher has also said:

"There is little evidence that pregnancy in itself worsens a psychosis, either intensifying it or rendering prognosis for full recovery less likely." (60 at p. 121)

he must not consider the unborn as "mere tissue of the mother" or he will certainly weigh it no more in the balance than any other replaceable tissue of the mother. Has anyone ever considered the standard vague by which a surgeon removes a cancerous breast? Yet isn't the standard exactly the same? The surgeon removes the cancerous breast to save the life or health of the mother. How much more important is that standard when applied to save the life of the child. Congress spoke and said that under some circumstances, it may be necessary to take the life of the child, but it may not be done unless necessary to preserve the life or health of the mother. The life of the child may not even under this liberal standard be taken except for grave reasons.

### CONCLUSION.

This *amicus* is guardian ad litem for the class of all unborn children in Illinois. A holding that Congress is powerless to provide any protection for the unborn children of the District of Columbia would have dire precedential consequences for those this *amicus* represents.

But Congress has the necessary power and has validly exercised it. The judgment below should be reversed.

Respectfully submitted,

DENNIS J. HORAN,  
 JEROME A. FRAZEL, JR.,  
 THOMAS M. CRISHAM,  
 DOLORES B. HORAN,  
*Attorneys for Dr. Bart Heffernan.*

DAVID W. LOUISELL,  
*Of Counsel.*

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**Fig. 1: Age — 40 days**





**Fig. 2: Age — 6 weeks**





**Fig. 3: Age — 8-9 weeks**





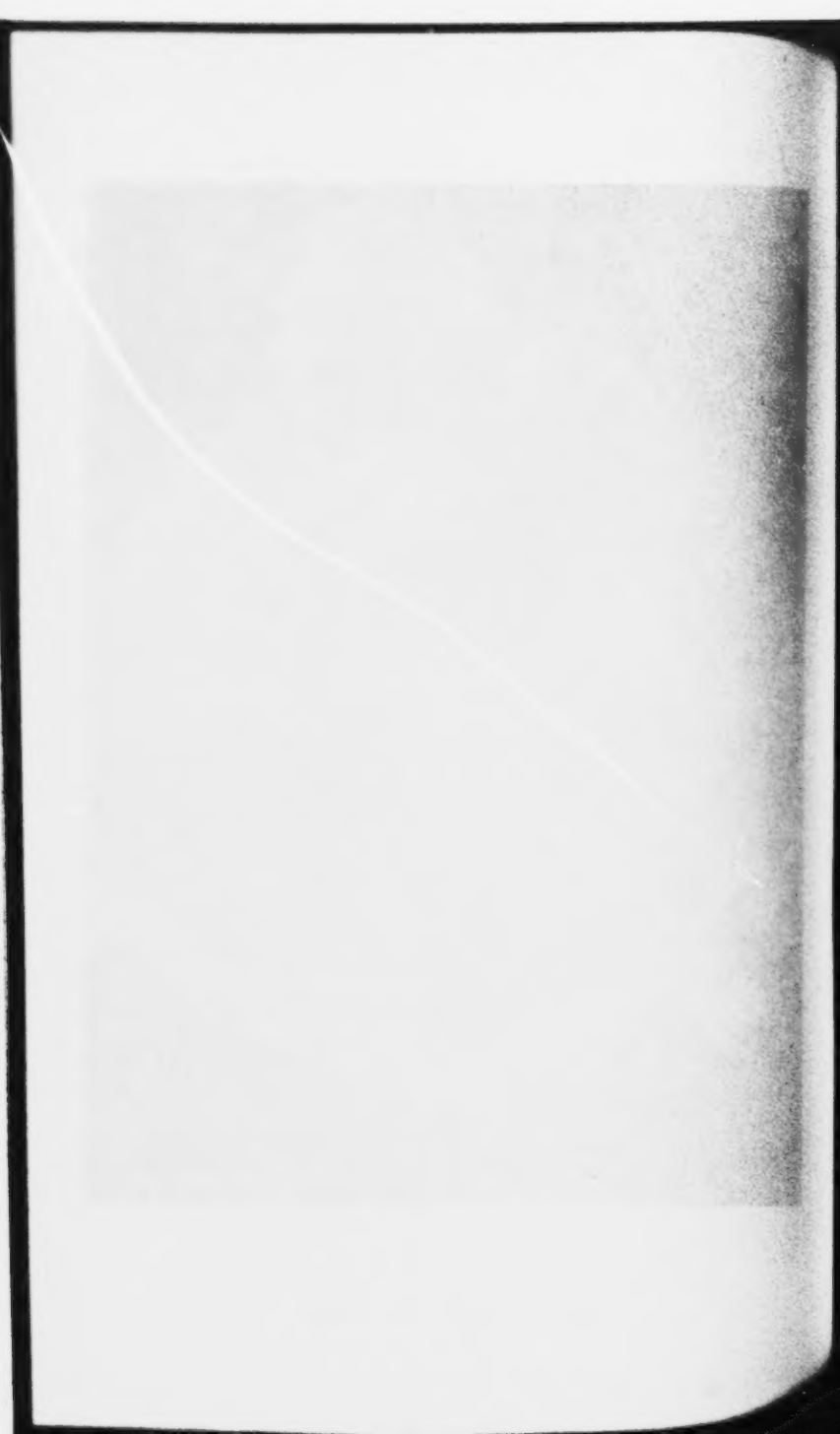
**Fig. 4: Age — 10 weeks**







**Fig. 5: Age — 11 weeks**





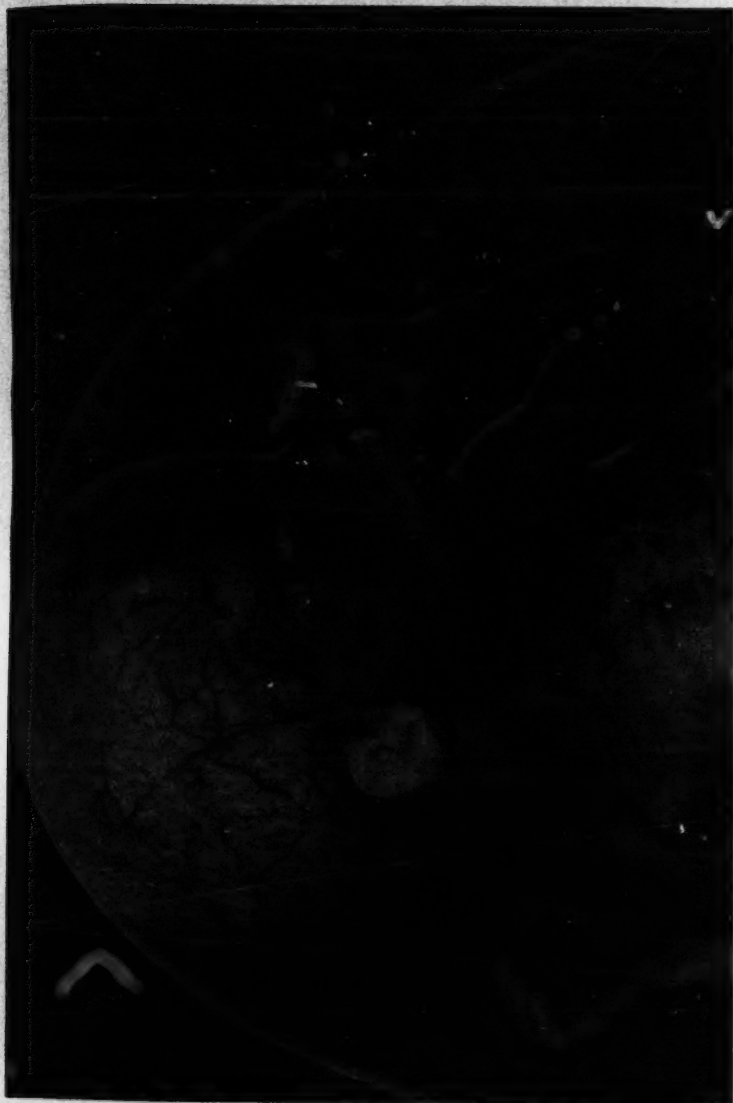
**Fig. 6: Age — 16 weeks**





**Fig. 7: Age — 17 weeks**





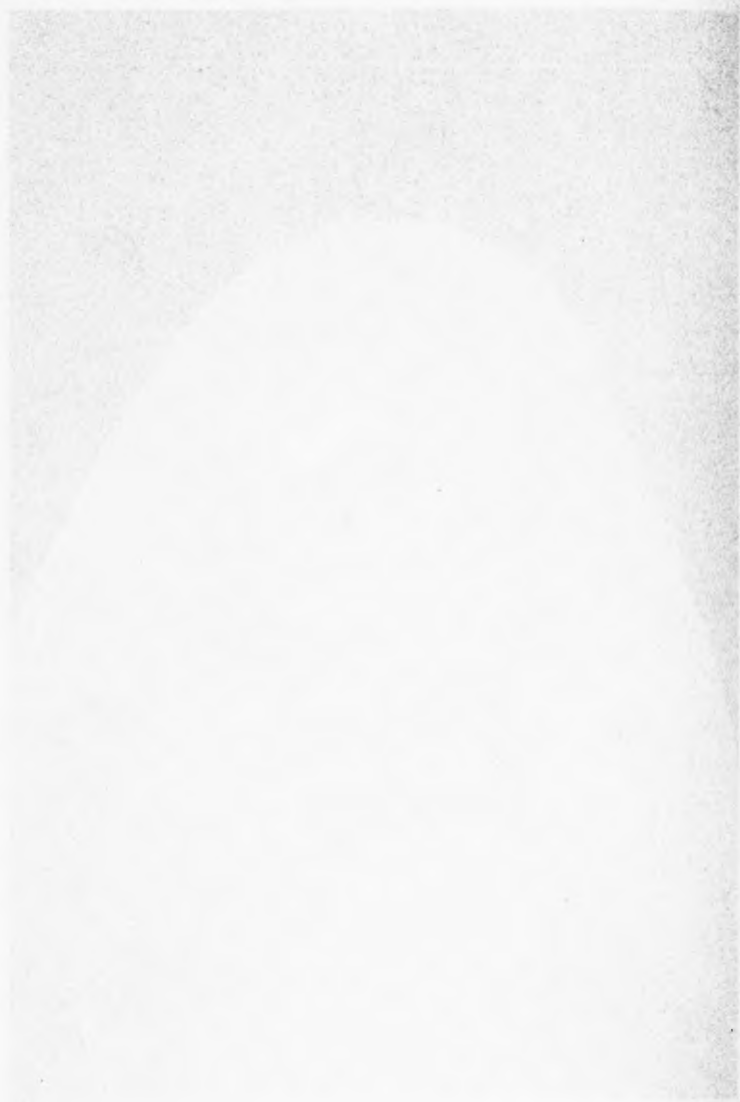
**Fig. 8: Age — 18 weeks**







**Fig. 9: Age — 28 weeks**



**APPENDIX A.**

---

IN THE UNITED STATES DISTRICT COURT.  
For The Northern District Of Illinois,  
Eastern Division.

---

JANE DOE and SALLY ROE, suing  
on behalf of themselves and all  
others similarly situated and  
DAVID N. DANFORTH, M.D.,  
CHARLES FIELDS, M.D., RALPH  
M. WYNN, M.D., FREDERICK P.  
ZUSPAN, M.D., suing on behalf  
of themselves and all others  
similarly situated,

*Plaintiffs,*

*vs.*

WILLIAM J. SCOTT, Attorney Gen-  
eral of the State of Illinois, and  
EDWARD V. HANRAHAN, State's  
Attorney of Cook County, Illinois,

*Defendants.*

No. 70 C 395  
Jury Demanded.

---

PETITION OF DR. BART HEFFERNAN  
TO INTERVENE.

---

Now comes Dr. Bart Heffernan, who respectfully re-  
quests this Court for leave to intervene on behalf of Baby  
Boy Doe and Baby Girl Roe, who are conceived but un-  
born, and on behalf of all unborn children who seek,  
through this intervention, the fundamental right of all

mankind—due process of law for the preservation of human life—and says unto the Court as follows:

1. Plaintiffs have filed a class action seeking a declaratory judgment from a three-judge court that the abortion statutes of the State of Illinois are unconstitutional and void.

2. The plaintiffs describe themselves as representatives of that class of citizens in the State of Illinois, who, because of the abortion statute, must bear unwanted children or seek abortions in foreign nations or states. Plaintiff physicians have described themselves as representing a class of physicians licensed in the State of Illinois and practicing in the area of obstetrics and gynecology.

3. The defendants named are the Attorney General of the State of Illinois and the State's Attorney of Cook County, Illinois, those charged with the duty to uphold the statutes of the State of Illinois in such a declaratory judgment as this.

4. However, there is another class of individuals intimately concerned with the outcome of this suit: children unborn, who, if the abortion law is vitiated, will have no due process of law for the preservation of life, but must depend upon the magnanimity and personal convenience of their parents as to whether or not they will in fact exercise the most fundamental civil right of all persons: the right to life as is guaranteed by the United States Constitution, the Constitution of the State of Illinois, the United Nations Charter, the Charter of the World Health Organization and the Universal Declaration of Human Rights of the United Nations, which states:

*"Article 3—Everyone has the right to life, liberty and security of person."* U. N. General Assembly, 2nd Session, Doc. A/811.

5. Your intervenors are unborn children who will be adversely affected by the abolition of the abortion statute in that their lives may be taken from them without due process of law and without the equal protection of the laws as guaranteed, both by the United States Constitution and the Constitution of the State of Illinois.

6. There is no party presently appearing in this case who adequately represents the class of individuals that your intervenor seeks to represent here. One plaintiff states that she has an unwanted child while the other indicates that she terminated the life of her unborn child for reasons which she does not state in her Complaint. Plaintiff physicians, nowhere in their Petition, mention the rights of the unborn child, but talk only of the rights of the mother and of the stresses of their practice. The defendants, Attorney General and State's Attorney, are charged with statutory obligations to uphold the law and to represent the community as a whole in this action. No party represents the unborn child *per se* and no party presently appearing in this case will present a vigorous case on behalf of the class of unborn children which your intervenor seeks to represent in this litigation.

7. The number of members of this class, which your intervenor seeks to represent in this litigation, is large and joinder of all members is impractical and impossible. There are questions of law and fact which will determine the rights of every member of this class and most importantly, will determine the *right to life* of every member of this class. The claim of the intervenor is the claim of due process under law for the preservation of life and is not only a typical claim of each member of this class, but is the fundamental claim of all human life. Your intervenor will fairly, adequately and aggressively protect the interests of each member of this class and your

petitioner, therefore, requests appointment as Guardian Ad Litem for and on behalf of this class.

8. The class of unborn children will be irreparably injured if intervention is not allowed by this Court since the right to life of each member of the intervening class would be henceforth determined by persons uncontrolled by law and the unborn child would thus be deprived of life without due process or the equal protection of the law, as guaranteed to it by the United States Constitution, the Illinois Constitution and the other expressions of mankind cited previously.

9. Bart Heffernan, M.D. resides at 608 Laurel in Wilmette, Illinois. He is a registered and licensed physician and surgeon in the State of Illinois and is Board Certified in Internal Medicine. He is Director of the Galvin Heart Center at St. Francis Hospital and Chief of the Department of Medicine at St. Francis Hospital in Evanston, Illinois. He is a member of the American Medical Association, the Chicago Medical Society and the Illinois State Medical Society. He is Assistant Clinical Professor, Department of Medicine, Stritch School of Medicine. He is a member of the American Society of Internal Medicine. He is highly qualified and responsible; he will adequately and aggressively represent this class. Baby Boy Doe and Baby Girl Roe are actual existing unborn children.

10. Your intervenor asks leave to file herewith a Motion to Dismiss the Complaint for Declaratory Relief.

11. Your intervenor also requests this Court to grant him leave to file within ten days a Brief in opposition to plaintiffs' Motion to Convene a Three-Judge Court, a Brief in support of intervenor's Motion to Dismiss and a Brief in support of this Petition to Intervene.

WHEREFORE, your intervenor respectfully requests this

Court to enter an Order appointing Dr. Bart Heffernan as Guardian Ad Litem for the class of unborn children described herein and allowing him to intervene in this litigation in behalf of Baby Boy Doe and Baby Girl Roe and on behalf of all unborn children similarly situated and for such other relief as this Court may deem appropriate.

Respectfully submitted.

/s/ DENNIS J. HORAN,  
Dennis J. Horan

/s/ THOMAS M. CRISHAM,  
Thomas M. Crisham

/s/ JEROME A. FRAZEL,  
Jerome A. Frazel

*Attorneys for Dr. Bart Heffernan,*  
One North La Salle Street  
Chicago, Illinois 60602  
FInancial 6-5800



# APPENDIX B.

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## IN THE UNITED STATES DISTRICT COURT For The Northern District Of Illinois, Eastern Division.

---

JANE DOE and SALLY ROE, <i>et al.</i> ,	} No. 70 C 395
<i>Plaintiffs,</i>	
<i>vs.</i>	
WILLIAM J. SCOTT, Attorney General of the State of Illinois, <i>et al.</i> ,	
<i>Defendants.</i>	

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## ORDER.

---

This cause coming on to be heard on motion of Dr. Bart Heffernan for the entry of an Order *non pro tunc* as of March 11, 1970 clarifying the Court's Order entered as of said date, the Court having examined the motion, and heard statements of counsel, being fully advised in the premises;

IT IS HEREBY ORDERED that Dr. Bart Heffernan be and is hereby appointed guardian ad litem for the class of all unborn children in the State of Illinois who will be adversely affected by the abolition of the abortion statute in said State, and he is hereby authorized to intervene in this litigation on behalf of Baby Boy Doe and Baby Girl Roe, and on behalf of all unborn children similarly situated, *non pro tunc* as of March 11, 1970.

Entered:

/s/ W. J. CAMPBELL,

*Judge.*

April 10, 1970.

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

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No. 84

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UNITED STATES OF AMERICA,  
*Appellant,*

v.

MILAN VUITCH,  
*Appellee.*

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ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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**BRIEF OF DR. WILLIAM F. COLLITON, JR.,  
AND OTHER DISTRICT OF COLUMBIA PHYSICIANS,  
AMICI CURIAE IN SUPPORT OF APPELLANT**

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INTRODUCTORY STATEMENT

The few facts of record in this case, the pertinent District of Columbia statute and the opinion of the court below<sup>1</sup> are found in the brief filed by the United States. These *amici*, all of whom are identified in the footnote,<sup>2</sup> accept them for

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<sup>1</sup>The District Court's opinion is officially reported at 305 F. Supp. 1032 (D. D.C., 1969).

<sup>2</sup>Orhan Aydineli, M.D.; Salvatore V. Battista, M.D.; John F. Bresette, M.D.; John Cavanagh, M.D.; Edward J. Connor, M.C.; James D'Albora, M.D.; Joseph A. Dugan, M.D.; George J. Ellis, M.D.; Eugene Finegan, M.D.; J. Blaine Fitzgerald, M.D.; James J. Foster, M.D.; George Gartland, M.D.; Henry S. Gering, M.D. Richard Guy, M.D.; John Harrington, M.D.; William J. Hogan, M.D.; Paul F. Jaquet, M.D.; John J. Kuhn, M.D.; Juan G. Nolan, M.D.; Seamus Nunan, M.D.; and Joseph Schanno, M.D.

the purposes of their own brief. Both parties have given their written consents to the filing of this *amici curiae* brief. These have been filed with the Clerk.

### INTEREST OF THE AMICI AND THEIR POSITION IN THE CASE

1. *Interest of the Amici.* All of the *amici* are doctors licensed to practice medicine in the District of Columbia. Most of them are obstetricians, gynecologists, internists or surgeons with considerable experience in the practice of their respective specialties. Several of them serve on the faculties of local medical schools, and some are on the staffs of various hospitals in the District of Columbia.

The *amici* do not maintain or imply that the position which they espouse in this brief represents the unanimous, or even the majority, opinion held by doctors who practice medicine in the District of Columbia.<sup>3</sup> However, as practicing physicians, these *amici* are called upon from time to time for medical advice and professional assistance with respect to terminating an unwanted pregnancy. Whatever the final determination of the Court in this case may be, its ruling will necessarily affect and, to some extent, control the medical practice and professional conduct of these *amici*, as well as all other doctors practicing medicine in the District of Columbia. Clearly, the law's treatment of a recurring aspect of their medical practice is a matter of substantial professional interest to them and one on which, we believe, they are entitled to be heard in this litigation.

2. *The Position of the Amici on the Issues.* As will appear, these *amici* support the United States in maintaining that the relevant statute<sup>4</sup> is not unconstitutionally vague on

<sup>3</sup>The members of the District of Columbia Medical Society obviously have differing opinions on the general questions upon which this case touches. *Washington Post*, June 24, 1970, p. C-1. The same strong division of medical opinion exists within the American Medical Association. *New York Times*, June 26, 1970, p. 1; *Washington Post*, June 26, 1970, p. A-1.

<sup>4</sup>22 D.C. Code 201 (1967).

its face. Additionally, however, there may arise other issues which were raised by the defendant in the court below and which he again presses in this Court. These include his claims that the statute: (1) abridges First and Fifth Amendment rights of doctors and (2) unconstitutionally invades certain rights of privacy and family interests allegedly guaranteed by the Constitution, because the law does not rest on any substantial competing state interest sufficient to justify its existence and application.<sup>5</sup>

It is the understanding of these *amici* that the Solicitor General does not intend to deal with this second category of constitutional issues. We share his opinion that such issues need not be reached and also, as we argue below, should not be decided on the sparse record which furnishes the "fragile . . . foundation" on which this appeal is grounded. *Poe v. Ullman*, 367 U.S. 497, 501 (1961). Nevertheless, the defendant did raise them, at least in a general way, in his motion to dismiss the indictment (A. 4). While the District Court judge did not pass upon these issues, he did acknowledge, with some favor, their assertion by the defendant (A. 6, 8). Thus, they may be open to the defendant as grounds on which he might rely in supporting the trial court's decision on the Government's appeal to this Court. *Anderson v. Atherton*, 302 U.S. 643 (1937); *United States v. American Express Co.*, 265 U.S. 425, 435-36 (1924); but cf. *United States v. Blue*, 384 U.S. 251, 256 (1966); Stern & Gressman, *Supreme Court Practice* 41-42 (1969).

The instant case then is an appropriate one for these *amici* to attempt to offer assistance to the Court in reaching its decision, especially since there may lurk in the record important constitutional issues which the Court may wish to take up and decide, but to which the appellant may not direct argument.<sup>6</sup>

<sup>5</sup>Appellee's Motion To Affirm, p. 26.

<sup>6</sup>Krislov, *The Amicus Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 715 (1963); Wiener, *Briefing and Arguing Federal Appeals* 270 (1961).

## QUESTIONS PRESENTED

As *amici* see it, the determinative question presented is, as stated by the Solicitor General, whether the phrase "necessary for the preservation of the mother's life or health" contained in the District of Columbia abortion statute is unconstitutionally vague on its face. However, the Court also may be called upon to decide: (a) whether it should pass upon the further constitutional issues urged upon it by the appellee, and, if so, (b) whether the statute, on its face, abridges or impairs rights guaranteed doctors by the First and Fifth Amendments and rights of privacy of pregnant women provided by virtue of the interaction of the Fourth, Fifth and Ninth Amendments to the Constitution of the United States.

As they argue below, *amici* believe that the answer to all three of these questions should be in the negative.

## SUMMARY OF ARGUMENT

### I.

A. The claim that the statute is unconstitutionally vague should not be determined on the basis of the present record, completely unilluminated by any facts. For the Court to decide that issue would be the type of precipitate and unnecessary judicial consideration of a constitutional question which this Court has traditionally avoided.

B. The phrase "necessary for the preservation of the mother's life or health" has been interpreted by the Circuit Court of Appeals for the District of Columbia to protect the physician who concludes in good faith that an abortion is necessary to preserve the mother's life or health, including mental health. The doctors of the District of Columbia are neither in doubt nor in fear as to where abortions permitted by the statute end and where those prohibited by it begin. The standard of "preservation of life or health" is the same standard which a doctor applies in making medical judgments in almost every aspect of his practice. The defendant could

not have been in any genuine doubt whether he was acting as a doctor or as an abortionist.

## II.

A. We have the gravest doubts that a purported abortionist has the proper standing to assert alleged, but as yet unestablished, rights of privacy on the part of pregnant women. In the absence of weighty countervailing policies, a litigant may only assert his own constitutional rights or immunities. No woman, pregnant or not, married or single, is a party to this litigation. Indeed, the record may show that the defendant performed an abortion on a woman who could turn out to be the chief complaining witness against him. It would appear ironic, if not offensive, to recognize any right in the defendant to raise vicariously the constitutional rights of pregnant women in the District of Columbia.

B. The appellee urges the Court to decide novel constitutional issues of great magnitude, the resolution of which will have a nationwide impact upon the law, the practice of medicine and the social mores of the people. Yet, the present record is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the enunciation of the far-reaching, new constitutional principle which the appellee urges the Court to proclaim. Completely missing are any of the specific facts on which the offense charged is based. In addition, there is a complete lack in the record of any medical, social, economic or other relevant facts which bear on the question of whether the Constitution should be construed to vest in a pregnant woman the unfettered right to destroy her unborn child for any reason whatsoever.

C. The prematurity for decision of the issues that appellee would have the Court resolve on the barren record in this case is further compounded by two other circumstances. First, since the case has come here by direct review, this Court has not had the advantage of the view of the United States Court of Appeals for the District of Columbia Circuit. Direct appeals are not favored. This is especially true when a

direct appeal raises issues which were never passed on in the single court which heard the case prior to its arrival in this Court. Moreover, the Court will have opportunity soon enough to pass on the question of whether the Constitution confers on a woman the unabridgeable right to terminate an unwanted pregnancy. One such case is already pending in this Court. Nine other cases which raise the same constitutional issues advanced by the appellee are now in various stages of litigation in the federal and state courts.

### III.

A. Whatever the metaphysical view, the legal concepts as to the nature and rights of an unborn child have drastically changed, based on expanding medical knowledge over the last 2,500 years. As recently as 1921, a respected state court could maintain that the child in the womb is part of his mother. The findings of medical science have destroyed that myth. The leading doctors and scientists in the field now agree that life begins not at birth, but either at conception or within six or seven days thereafter. They further agree that a developing fetus is alive, not only in the sense that he is composed of living tissue, but also in the sense that he is a living, striving human being, from the very beginning. Very early in the pregnancy the fetus manifests a working heart and brain different from his mother. There is no question but that his individual animate existence, or life, begins no later than the stage at which the cells which make up the fetus separate from those cells which later become the placenta. Thus, the state's interest in the preservation of human life in the womb rests upon the undisputed medical evidence.

B. The law has recognized the rights of an unborn child in other important areas. For example, the property rights of an unborn child, at all stages of fetal development, were recognized by English law before the end of the eighteenth century. The same recognition was afforded the property rights of an unborn child by American courts. In property law there was no requirement that the fetus must be "quick",



*i.e.*, that his presence within her body be felt or recognized by the mother. The rules protecting property rights of an unborn child have been applied even where their application benefited some third party rather than the child, and even where the child himself suffered disadvantage because of such application. We believe it would be an ironic and inexplicable perversion of both human and constitutional values if it were to be the law that a state has an interest in protecting the property rights of an unborn child but has no compelling, constitutionally justifiable interest in regulating the circumstances and conditions under which he may be destroyed.

C. In the field of tort law there has been a dramatic development and complete change in the law in response to expanding scientific knowledge and medical facts that formerly were unavailable. Until well into the twentieth century most American decisions denied recovery in tort to the human offspring harmed in the womb, primarily on the ground that the defendant owed no duty to a person who was not in existence at the time of the tort. The premise here, of course, was the now repudiated notion that the unborn child was a part of his mother. Almost every jurisdiction which has considered the issue in the last 30 years has upheld the right of an infant to sue for injuries sustained prior to birth, including the right to sue under a wrongful death statute, whether or not the injury occurred at the time the unborn child was viable or not. If the state may protect the unborn child by a court action awarding damages for a tort, *a fortiori* it cannot be impotent to protect the same living being by criminal sanctions which prohibit his arbitrary destruction.

D. It is also now established that the law will recognize an unborn child's right to support by his parents. If a state has sufficient justification to require a father to support an unborn child which he may not want, can it be fairly maintained that the same state has no justifiable interest in protecting from destruction as a living being a child which his mother may not want?

E. This Court has firmly settled that the free exercise of religion rights guaranteed by the First Amendment are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. Nevertheless, the right of an unborn child to live has served to permit the state's abridgement of or interference with a mother's religious convictions when necessary to save the life of an unborn child. These are cases where the court has to override the religious convictions of a mother and order a blood transfusion in order to save an unborn child within the womb. Either expressly or impliedly such judicial results are based on the findings of modern medical science concerning the nature of the fetus and constitute recognition of the right of the child in the womb to the protection of the law.

F. The *amici* believe that in any balancing of constitutional values or rights, life must be preserved over alleged privacy. Even if there is a certain right of privacy on the part of a woman arising from the marital relationship, with which the state cannot unjustifiably interfere, there is another right involved here, and the most fundamental of the personal liberties protected by the Due Process Clause, *i.e.*, the unborn child's right not to "be deprived of life", in the very words of that constitutional provision. Thus, the Court is not confronted with a balancing between a right of personal liberty on the one hand and some lesser competing state interest on the other. The choice here is between a nebulous and as yet unrecognized legal right of privacy on the part of a woman with respect to the use of her body and the personal right to life of an unborn child, with a concomitant right on the part of a state to prevent its unjustifiable destruction.

The state's interest in regulating abortion is not bottomed exclusively on its concern for the health of the mother. The state interest which justifies what the Congress had done rests on concern for the preservation of human life, even though that life be within the womb. There are no decisions of this Court which suggest the existence of an unrestricted right of body integrity on the part of a woman sufficient to permit

her alone to decide, for whatever reason, whether to terminate a pregnancy. To sustain the attack on the statute which the appellee makes in urging that it offends against an alleged right of privacy would require this Court's unabashed return to the long-repudiated concept of substantive due process which plagued its decisions for several generations.

Public and medical opinion with respect to liberalization of the abortion laws is divided. However, the predilections of the populace, even those of its most enlightened members, much less the individual preferences of judges, cannot serve as a basis to strike down legislation within the competence of a state to enact, especially when such legislation is aimed at protecting the most fundamental of the personal liberties protected by the Due Process Clause, that is, the right not to "be deprived of life."

G. All the cases cited by the appellee in support of his claim that a right of privacy is constitutionally guaranteed are clearly distinguishable on their facts. The only one that even superficially might be regarded as an analogy to support appellee's position here is *Griswold v. Connecticut*, 381 U.S. 479 (1965). *Griswold* stands only for the proposition that a law outlawing the use of contraceptives, enforcement of which would require invasion of the marital bedroom, transgressed on the intimacies of and the right of privacy inherent in the marital relationship, including the sexual relationship. The District of Columbia abortion statute does not affect the sexual relationships of husband and wife. Moreover, in *Griswold* the Court was not called upon to choose between the right to privacy and the right to life, the choice it must make in this case. Nor can it seriously be argued that abortion, a crime at common law, is a fundamental, albeit "penumbral", liberty reserved by the Ninth Amendment.

## IV.

A. The appellee's claims that the statute abridges his First and Fifth Amendment rights are without merit. He was indicted for performing an abortion, not for making a speech or giving medical advice. If the statute is one within the competency of the District of Columbia to enact, then argument is closed, since a criminal act does not fall within the freedom of speech which the First Amendment protects. The same rationale answers the appellee's claim that he is unconstitutionally restrained in the practice of his profession.

B. Nor does the statute effect any invidious discrimination between rich and poor, as suggested by the appellee. It applies to all persons committing the acts condemned by it and there is no suggestion that it seeks to discriminate on any invidious basis, including that of income. Even if it is true that the rich are in a better position to go to a jurisdiction where abortions are legal or to engage the services of more sympathetic physicians, the answer would be no different. There is no requirement of equal protection that all evils of the same genus be eradicated, or none at all. If the law in this instance, as in so many others, bears more oppressively on the less financially fortunate, the remedy lies in the elimination of the causes of poverty and the reform of the administration of criminal justice, not by the selective invalidation of otherwise lawfully enacted statutes.

C. The appellee argues that the common welfare would be better served by a liberal abortion law. He is concerned about the unsafe conditions which surround criminal abortions and is also moved by the grave problem of overpopulation. Whatever the efficacy of such arguments, it is to the Congress, not to this Court, that they should be directed. Apart from that, the *amici* question their persuasiveness. The evidence is that liberalization of abortion laws has effected no reduction in the rate of abortions in other countries, so all that is done is to increase the total number of abortions. Finally, so far as the problem of overpopulation is concerned, an abortion, whether on the free demand of a woman or pursuant to the

intimidating command of the state, appears to us as a singularly ineffective, and indeed extremely dangerous, way to attempt to solve the population problem, at least in the context of the humanistic values traditional to Western Civilization. In any event, this Court is not the forum, and this case is not the occasion, to debate whether unrestricted abortion would best serve the general welfare of the people of the District of Columbia.

## ARGUMENT

### I.

#### THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE

A. *The Question Should Be Illumined by Some Facts.* The amici cannot offer arguments of additional substance to those which the Solicitor General has made in challenging the decision of the court below on the vagueness issue. They agree with the Government's contention that the statute should not have been held unconstitutionally vague on its face. Rather, as the Solicitor General urges, the case should be remanded for further proceedings in the trial court to determine whether the facts, which, for the most part, are unknown on the basis of the existing record, fairly generate issues of constitutional dimension requiring a decision by this Court. *United States v. Automobile Workers*, 352 U.S. 567, 591 (1957). Mr. Chief Justice Hughes' lament concerning the Court's "self-inflicted wounds"<sup>7</sup> covers several kinds of precipitate and unnecessary judicial consideration of constitutional issues, including the construction of statutory language in the vacuum of a barren record, as is the case here. Such concern has a special force when the Court is asked to strike down an Act of Congress, a co-equal branch of the Federal Government. *United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953). And it remains unassailably true that the "best teaching of this Court's experience admonishes us

<sup>7</sup>Hughes, *The Supreme Court of the United States* 50.

not to entertain constitutional questions in advance of the strictest necessity." *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949).

*Amici* accordingly urge that the case be remanded to the trial court, as suggested by the Solicitor General, and that any determination of the vagueness issue be deferred until the facts have been developed at trial.

B. *The Statutory Exemption Is Not Vague.* Again, there is not much that these *amici* can add to the Solicitor General's argument that the statute is not unconstitutionally vague and sets forth with reasonable clarity and sufficient particularity the kind of conduct which the statute penalizes and that which it exempts. The exempting phrase, "necessary for the preservation of the mother's life or health", clearly protects the District of Columbia physician who concludes in good faith that an abortion is necessary to preserve the mother's life or health, including mental health. *Williams v. United States*, 138 F.2d 81, 84 (C.A. D.C., 1943). Such is the precise interpretation which the highest court of the District of Columbia has given the statute now drawn into question in this case. *Williams v. United States, supra*. Under the circumstances, it appears particularly inappropriate to these *amici*, all doctors who have lived easily with the statute as thus defined, to ask that this Court now "parse . . . [the] statute as grammarians or treat it as an exercise in lexicography . . . [rather than reading] it in the animating context of well-defined usage." *Beauharnais v. Illinois*, 343 U.S. 250, 253 (1952).

Doctors, we assure the Court, are neither in doubt nor in fear as to where abortions permitted by the statute end and where those barred by it begin. For example, a recent study in California, whose abortion statute has an exception limited solely to cases where termination of the pregnancy is necessary to preserve the life of the mother,<sup>8</sup> shows that there has never been a prosecution for an abortion performed in a hos-

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<sup>8</sup>Cal. Penal Code § 274.

pital by a physician licensed to practice medicine in that State. Packer & Gamspell, *Therapeutic Abortion, A Problem in Law and Medicine*, 11 Stanford L.R. 418, 444 (1959). Other recent studies show the same has been true in New York and in Maryland. Hellegers, *Abortion, the Law, and the Common Good*, 3 Medical Opinion and Review, No. 5 (May 1967), p. 84. The amici are confident that this has also been the fact in the District of Columbia, and in that jurisdiction, as in the others, "the law has not gone out of its way to make things difficult for the physician, . . ." Indeed, if there is a more appropriate and familiar guide or standard than "preservation of life or health" to govern the practice of medicine generally we are unaware of it. In truth, it is the same standard which a doctor applies in making medical judgments in almost every aspect of his practice.

The studies cited in the preceding paragraph confirm the practical wisdom of then Judge Thurmond Arnold's observation, made 27 years ago, that it is "easy for the physician who directs an abortion in good faith to testify that it was necessary for health and such evidence would be extremely difficult to refute." 138 F.2d at 84. Thus, in the District of Columbia and, we feel certain, in most other American jurisdictions the so-called "doctor's dilemma", as Dr. Guttmacher once put it in reference to the "preservation of life" exception to state anti-abortion statutes,<sup>10</sup> is purely a philosophical or subjective choice, the resolution of which has no adverse

<sup>9</sup>Hellegers, *supra* at 84. Indeed, a recent decision of the Court of Appeals for the District of Columbia Circuit suggests, should appellee prevail on this appeal, that any "doctor's dilemma" will not be whether he will be punished if he performs an abortion but whether he will be punished if he does not. *Mary Doe, et al. v. General Hospital of the District of Columbia, et al.*, C.A. No. 24,011. For a recent case showing this is not an illusory concern see *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967). Should doctors who object to performing abortions for social or economic reasons offered by women because such abortions offend either their religious, philosophical or professional convictions be exposed to serious civil liability?

<sup>10</sup>Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma*, 21 Jour. Mt. Sinai Hosp. 111 (1954).



practical consequences, either in the administration of the criminal law or on the food faith practice of medicine. See, e.g., *Kudish v. Bd. of Registration in Medicine*, \_\_\_ Mass. \_\_\_, 248 N.E.2d 264, 266 (1969).

Perhaps it was partially because of his brilliant doctor-father that Mr. Justice Holmes was blessed with an eminently practical, as well as a superbly philosophical, turn of mind. In any event, his words, as in so many other areas of constitutional law, supply the answer to any claim of the alleged vagueness of 22 D.C. Code 201. Speaking for the Court in *United States v. Wurzbach*, 280 U.S. 396, 399 (1930), he said:

"Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk."

Here, too, Dr. Vuitch could not have been in any genuine doubt whether he was acting as a doctor or as an abortionist.<sup>11</sup> The Solicitor General is right in arguing that the trial court erred in holding the statute to be unconstitutionally vague on its face, and his decision should be reversed.

## II.

### THE COURT SHOULD NOT PASS UPON THE ADDITIONAL CONSTITUTIONAL CONTENTIONS ADVANCED BY APPELLEE

As he did in the trial court, the appellee again raises in this Court claims that the District of Columbia anti-abortion statute violates certain First and Fifth Amendment rights of his, and also impinges upon alleged Fourth, Fifth and Ninth

<sup>11</sup>See also *Perkins v. North Carolina*, 234 F. Supp. 333, 336 (W.D. N.C., 1964), where it was held that the phrase "abominable and detestable crime against nature, with either mankind or beast" was not unconstitutionally vague, although if it had been a newly enacted statutory proscription it would have been.



Amendment "rights of privacy" possessed by a woman entitling her alone to make the untrammelled decision to terminate an unwanted pregnancy. As stated *supra*, p. 3, the District Court did not pass upon these particular contentions of the appellee.<sup>12</sup> Nor should this Court—for several reasons. These are: (1) the substantial doubt which exists regarding the appellee's standing to raise constitutional rights allegedly inhering in pregnant women; (2) the complete dearth in the record, both of the specific facts of this criminal case and of the broader medical and social facts which necessarily must attend resolution of the unique and far-reaching constitutional issues offered by the defendant; and (3) the pendency of other cases, one of which, before too long, surely will provide a more appropriate vehicle for an authoritative decision by this Court on such important issues.

*A. Appellee's Standing To Complain of the Alleged Constitutional Rights of Pregnant Women Is Doubtful.* Amici do not dispute Dr. Vuitch's right to argue that the statute impinges on (a) rights of free speech guaranteed him by the First Amendment and (b) the right to practice his profession which the Fifth Amendment protects.<sup>13</sup> However, they have the gravest doubts that a purported abortionist has the proper standing to assert alleged, but as yet unestablished, rights of privacy on the part of pregnant women sufficient to permit them to authorize, on their own volition, the destruction of an unwanted, unborn child.

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<sup>12</sup>The *amici* admit that these contentions or grounds, while not passed upon in the court below, technically may appear to have been preserved in this Court. *United States v. Raines*, 362 U.S. 17, 27 (1960). The matter, however, as the Solicitor General points out, is not free from doubt and if such claims represent "constitutional questions that are not yet precisely in issue" this Court, of course, will not consider them on the Government's appeal under the Criminal Appeals Act (18 U.S.C. 3731). *United States v. Petrillo*, 332 U.S. 1, 11 (1947).

<sup>13</sup>*Wilker v. Committee on Character and Fitness*, 373 U.S. 96, 102-03 (1963).

This Court many times has held that, in the absence of "weighty countervailing policies . . . a litigant may only assert his own constitutional rights or immunities." *United States v. Raines*, 362 U.S. 17, 22 (1960); *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). Almost precisely in point would appear to be *McGowan v. Maryland*, 366 U.S. 420 (1961). In that case, the Court upheld the conviction of employees of a department store who had been found guilty of selling goods in violation of the state's Sunday Closing Laws. Concerning their contention that the Sunday Closing Laws violate the Free Exercise Clause of the First Amendment, as incorporated in the Fourteenth, the Court said:

"First, appellants contend here that the statutes . . . violate the constitutional guarantee of freedom of religion in that the statutes effect is to prohibit the free exercise of religion in contravention of the First Amendment, made applicable to States by the Fourteenth Amendment. But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that 'a litigant may only assert his own constitutional rights and immunities,' we hold that appellants have no standing to raise this contention. . . . Those persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights. Appellants present no weighty countervailing policies here to cause an exception to our general principles." 366 U.S. at 429-30.

Similarly, in the case at bar no "weighty countervailing policies" require the drawing of an exception to the general rule that a party can assert his own constitutional rights but not those of others. If well established Free Exercise of Religion rights may not be vicariously asserted, surely alleged, unique, sweeping but, at this point in time, legally unrecognized rights on the part of a pregnant woman to terminate an unwelcome pregnancy for any reason should not be decided upon the urging of a stranger. *Tileston v. Ullman*, 318 U.S.

44, 46 (1943). No woman, pregnant or not, married or single, is a party to this litigation. For all the present enigmatic record ultimately may show, it is very possible that the woman upon whom Dr. Vuitch is alleged to have performed the abortion may turn out to be the chief complaining witness against him. A more direct conflict of interests would be difficult to arrange. Putting aside the irony of such a possible state of the facts, the circumstances of this case strike the *amici* as one where it would be almost offensively inappropriate to permit the appellee to stand in the constitutional place of the pregnant mothers of the District of Columbia, who, for one reason or another, wish to get rid of their unborn child.<sup>14</sup> For reasons, the lack of standing on the part of the appellee to raise the "right of privacy" question should deter the Court from adjudicating it on this appeal.

*B. The Record Is Not a Proper One To Serve As a Basis of Decision For the Additional Constitutional Objections Pressed by the Appellee.* There is no question but that the additional constitutional issues which appellee would have this Court decide, as he has put it, in the interest of obtaining a "final definitive rule",<sup>15</sup> raise novel constitutional issues of great magnitude. Their resolution will have a nationwide impact upon the law, the practice of medicine and the social mores of the

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<sup>14</sup>Nor does *Griswold v. Connecticut*, 381 U.S. 479 (1965), argue against that proposition. In that case the doctor was convicted of aiding and abetting married couples in advising and prescribing the use of contraceptive devices prohibited by Connecticut law. The use of such devices was the principal crime in the commission of which it was charged that the doctor had aided and abetted. In the instant case the defendant was not charged with a crime which could *only* be committed by those whose rights he now purports to vindicate, *i.e.*, pregnant women wishing to destroy a fetus. Moreover, the language of 22 D.C. Code 201 (1967) implies that a mother could not be convicted of the crime of abortion on herself. Certainly there is no reported case in the District of Columbia which suggests that the prosecution has ever attempted to invoke the statute against an aborting mother.

<sup>15</sup>Appellee's Motion To Affirm, p. 19.

people. Before this Court succumbs to the temptation to resolve such issues now, it first must decide whether the instant case is the appropriate vehicle in which to do that.

The Court often has admonished that it will not decide important constitutional questions, however appealing, on the basis of an inadequate or amorphous record. *Ellis v. Dixon*, 349 U.S. 458, 462 (1955); *Wolfe v. North Carolina*, 364 U.S. 177, 194 (1960). More recent examples of the same prudent restraint may be found in *DeBacker v. Brainard*, 396 U.S. 28, 32 (1969), and *Powell v. Texas*, 392 U.S. 514, 521 (1968). In *Powell*, four members of this Court declined the opportunity to determine that the Cruel and Unusual Punishment Clause of the Eighth Amendment, as now incorporated in the Fourteenth Amendment, barred conviction of a chronic alcoholic for the crime of public drunkenness. Even more so than in *Powell*, *supra*, the record in the present case "is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and far ranging new constitutional principle." 392 U.S. at 521.

The record in the instant case is deficient in two important respects. First, almost completely lacking are the specific facts on which the offense charged is based. The record shows only that the defendant is a licensed physician and was indicted for performing an abortion on a pregnant woman (A. 2). Missing are any facts as to: (1) whether the woman was married or unmarried; (2) whether she was an adult or a minor; (3) whether, if married, her husband knew of, and approved, the abortion; (4) whether the abortion was performed in a hospital, a doctor's office, a private home or a garage; (5) whether the fetus which was destroyed was 2, 25 or 35 weeks old; (6) whether the unborn child was biologically alive, viable or had "quickened"; (7) whether or not the life or health, including the mental health, of the woman was endangered if the abortion was not performed or whether the mother desired to terminate the pregnancy for economic or purely social reasons; and (8) whether or not the mother suffered any ad-

verse physical or mental consequences as a result of the abortion allegedly performed by the defendant.

Could such a total factual vacuum furnish the proper occasion for this Court to decide the grave issues urged by the appellee in the alleged interests of avoiding "costs and delay, prevent[ing] continued litigation on the substantive issues, and conserv[ing] judicial time and resources"? Putting it most mildly, the impoverished record which accompanies this appeal "hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases." *Powell, supra* at 522.

Going beyond, however, the complete lack of specific evidentiary facts peculiar to the case itself, there also may not be found in this record a single jot of medical, fetological, physical, psychiatric, psychological, psychoanalytical, social or economic evidence or other relevant general facts which might bear on the question of whether the Constitution should be construed to vest in a pregnant woman the unfettered right to destroy her unborn child when she feels so disposed.

C. *Two Additional Reasons for Declining Review.* The prematurity or inappropriateness for decision of the issues that appellee seeks the Court to resolve on this barren record is further compounded by two other circumstances. First, the case has come here by direct appeal, pursuant to the Criminal Appeals Act, 18 U.S.C. 3731, and thus has not been subject to review by the United States Court of Appeals for the District of Columbia Circuit, in which court some of the constitutional arguments that underlay the novel issues tendered by the appellee might have been developed in more informative detail. It would appear by virtue of 23 D.C. Code 105 (1967) that the case could have been appealed to the Circuit Court of Appeals, and this Court's order of June 29, 1970 in this case suggests that it may be troubled that such an appeal route was not followed. *United States v. Sweet*, 38 U.S. Law Week 3520, June 30, 1970; *United States v. Burroughs*, 289 U.S. 159 (1933). *Amici* are

inclined to agree with the parties that the literal language of the Criminal Appeals Act tends to support this Court's jurisdiction of the appeal, at least so far as the issue of alleged vagueness is concerned. Nevertheless, the lack of intermediate review by the Court of Appeals of the District of Columbia Circuit furnishes another sound reason for this Court to decline review of other important constitutional issues which are not necessary for its decision and which are without the benefit of any factual record. Direct appeals under 18 U.S.C. 3731 are generally something "unusual, exceptional and unfavored, . . ." *Carroll v. United States*, 354 U.S. 394, 399-400 (1957); *United States v. Sisson*, 38 U.S. Law Week 4616, 4623, June 30, 1970. Especially should this be true when a direct appeal raises issues never considered or ruled on in the only court which heard the case prior to its arrival in this Court.

Finally, there is little doubt that the Court will have an opportunity quite soon enough to pass upon the question of whether the Constitution confers on women, or at least on married women, an unabridgeable right to terminate an unwanted pregnancy. Already pending in this Court is the appeal taken from the decision of a three-judge federal court in *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wisc., 1970), *app. pend.*, No. 297, October Term, 1970. *Babbitz* squarely raises the "right of privacy" question, the lower court having upheld such a right in striking down the Wisconsin abortion statute. In that case, there is a "great volume of legal, medical and biological evidence"<sup>16</sup> bearing on the novel and important issue which the appellee asks the Court to decide in this case. *Amici* can also report to the Court that there are at least nine other cases, the majority of them three-judge federal court cases, in various postures of litigation, in which are raised, in several factual contexts, the same constitutional

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<sup>16</sup> Appellant's Jurisdictional Statement in No. 1729, October Term 1969, filed June 20, 1970, p. 21.

issues which the appellee would have the Court decide on the basis of the flimsy record out of which this appeal arises.<sup>17</sup>

For these several compelling reasons, *amici* respectfully urge that the Court decline to decide the additional constitutional issues which the appellee now raises in an attempt to convince the Court that the District Court's decision should be sustained, however it may decide the vagueness question.

### III.

#### UNFETTERED AUTHORITY TO DESTROY AN UNBORN CHILD IS NOT A RIGHT OF WOMANLY PRIVACY BEYOND THE JUSTIFIED INTEREST OF AND REASONABLE REGULATION BY THE STATE

As the Solicitor General points out, the decision of the District Court may have created a situation where any licensed physician in the District of Columbia may perform an abortion on a pregnant woman who desires it for any reason whatsoever. Of course, if this Court should agree that the trial court erred in finding the statute vague on its face, such an unfortunate state of affairs would be rectified. However, if the appellee convinces the Court to accept his argument as to the alleged constitutional right of privacy on the part of a pregnant woman to destroy her unborn child for

<sup>17</sup> Apart from the *Babbitz* case, there are three-judge federal court cases pending in the Northern District of Georgia (*Mary Doe, et al. v. Bolton*, C.A. No. 13676), the Northern District of Illinois (*Jane Doe, et al. v. Scott*, C.A. No. 70C395), the Southern District of Indiana (*Arnold, et al. v. Sendak, et al.*, C.A. No. IP70-C-217), the Eastern District of Kentucky (*Crossen v. Breckenridge*, C.A. No. 2143), Minnesota (*John Doe, et al. v. Randall, et al.*, C.A. No. 3-70, Civ. 97), New Jersey (*Young Men's Christian Ass'n of Princeton, N.J., et al. v. Kuglar*, C.A. No. 264-70), and the Northern District of Texas (*Jane Roe v. Wade*, C.A. No. 3-3690-B). A decision of the three-judge court, declaring the Texas abortion statute to be an unconstitutional invasion of the mother's right of privacy, was entered June 17, 1970. Two recent state cases have been decided, one in Massachusetts (*Commonwealth of Massachusetts v. Brunelle*, Superior Court for Middlesex Co., No. 8379), and another in South Dakota (*South Dakota v. Munson*, Circuit Court for Pennington County).



any reason she may have, then it is extremely doubtful that the District of Columbia or any state in the Union could pass a law regulating abortion, with the exception of requiring that abortions be performed by licensed physicians and, perhaps, that they take place in hospitals.<sup>18</sup> The basic postulates from which the appellee's arguments proceed are: (1) that the woman's sovereignty or control over her own body is a right of privacy similar to other rights growing out of the marital relationship; and (2) this right cannot be interfered with by the state, at least in the form which the present District of Columbia abortion statute takes, since the state cannot demonstrate any competing substantial interest to justify its intrusion into that relationship.

The contrary assumptions which disprove the propositions urged upon the Court by the appellee and which are developed in more detail in the *amici's* brief are: (1) The state's interest in preventing the arbitrary and unjustified destruction of an unborn child now rests more securely than ever on the undisputed medical evidence, recently confirmed by the new science of fetology, that the fetus is a living, human being even in the very earliest stages of its development; (2) Whatever personal right of privacy a woman may have with respect to the use and disposition of her body must be balanced against the personal right of an unborn child to life; and (3) The District of Columbia abortion statute strikes a constitutional balancing of such rights.

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<sup>18</sup>Even here, should the logic which underlies the appellee's basic position be carried just a bit farther, there may be serious doubt, despite the District Court's holding to the contrary, whether any right of unrestricted abortion could be limited to their performance in hospitals. If a woman has the "sovereignty over . . . her own body", which the appellee asserts, one could persuasively argue that she should be entitled to decide where the abortion is to be performed. Indeed, the appellee very recently stated publicly that "there was no need to restrict abortions to hospitals" and that his office, for one, "is equipped sufficiently to be considered a small out-patient clinic, . . ." The *Washington Post*, June 27, 1970, p. B-1.



A. *The State's Interest in Protecting the Rights of an Unborn Child Rests on a Proven Medical Basis.* Whatever the metaphysical view of it is, or may have been, it is beyond argument that legal concepts as to the nature and rights of an unborn child have drastically changed, based on expanding medical knowledge, over the last 2,500 years. In the ancient world, a child in the womb was considered as part of his mother.<sup>19</sup> And up to the seventeenth century it was prevailing doctrine, based upon Aristotle's notion, that 40 to 80 days after conception the fetus underwent a transformation that placed him in the human class. This notion was successfully demonstrated to be medical nonsense as early as 1621.<sup>20</sup> Thereafter, the medical profession gradually accepted the view that no valid line could be drawn within the womb. The law followed, but dragged considerably behind, the medical lead. For example, as recently as 1921, the Court of Appeals of New York, with Judge Cardozo dissenting, could hold that when "justice or convenience requires, the child in the womb is dealt with as a human being although physiologically it is part of the mother, . . ." *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567, 568 (1921).

At this point in time, however, there can no longer be sound medical facts offered to support the ancient notion that a fetus is "part" of his mother. The unassailable medical evidence to the contrary has now been convincingly confirmed by the findings of the new science of fetology, which came into existence by virtue of Liley's work on blood transfusions in the fetus.<sup>21</sup> Some of the observations and opinions on the question held by the most eminent of doc-

<sup>19</sup>This view was expressly incorporated in Roman law. Justinian, Digest 25.4.1.1.

<sup>20</sup>Zacchia, *Quaestiones Medico-Legales* 9.1 (1621).

<sup>21</sup>"Liley's pioneering work not only has opened new avenues in the treatment of erythroblastosis fetalis, but has inspired the whole new sub-specialty of 'fetology' and created a need for fetological surgeons and fetological medical specialists for the future." Montagu, *Hemolytic Disease of the Fetus, Intra-Uterine Development* 443, 455 (A. Barnes ed. 1968).

tors specializing in the field may be of interest to this Court, although a more comprehensive discussion of the medical evidence is to be found in the *amicus curiae* brief filed in this case by Dr. Heffernan of Chicago, Illinois.

Professor Ashley Montagu of Columbia University has stated it very concisely:

"The basic fact is simple: Life begins, not at birth, but at conception.

"This means that a developing child is alive, not only in the sense that he is composed of living tissue, but also in the sense that from the moment of conception, things happen to him, even though he may be only two weeks old, and he looks more like a creature from another world than a human being—he reacts. In spite of his newness and his appearance, he is a living, striving human being from the very beginning."<sup>22</sup>

It is now undisputed, for example, that the conceptus, or new fetus, possesses at the moment of its formation the so-called genetic code, the transmitter of all the potentialities that make men human, something that is not present in either their spermatozoon or ovum. Gottlieb, *Developmental Genetics* 17 (1966). At the moment conception takes place, scientists now generally agree "a new life begins—silent, secret, unknown."<sup>23</sup> Moreover,

"The child may be parasitic and dependent, but it is a functioning unit, an independent life. A child is

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<sup>22</sup>Montagu, *Life Before Birth* 2 (1964). Even if there is doubt whether the fetus can be recognized as a separate human being from the time of fertilization, there is no sound medical opinion which would deny that individual animate existence (or life) begins at the stage when the fetus separates or differentiates from the cells which will become the placenta. This development, called the blastocyst stage, occurs about six or seven days after conception. Cavanagh, *Reforming the Abortion Laws: A Doctor Looks at the Case*, *America*, April 18, 1970, p. 406.

<sup>23</sup>Coniff, *The World of the Unborn*, *New York Times Magazine*, January 8, 1967, p. 41.

not, in the words of Mr. Justice Holmes, 'a part of its mother.' However visceral may be its temporary residence, however dependent it may be before birth—and for some years after birth—it is a living being, with its separate growth and development, with its separate nervous system and blood circulation, with its own skeleton and musculature, its brain and heart and vital organs."<sup>24</sup>

A most vivid description of the fetus within the womb is found in the report of Dr. Liley and his wife, both pioneers of the new science of fetology. In 1967 they said:

"Because the fetus is benignly protected, warmed and nourished within the womb, it was long thought that the unborn must have the nature of a plant, static in habit and growing only in size. Recently through modern techniques of diagnosing and treating the unborn baby, we have discovered that little could be further from the truth.

"The fluid that surrounds the human fetus at 3, 4, 5 and 6 months is essential to both its growth and its grace. The unborn's structure at this early stage is highly liquid, and although his organs have developed, he does not have the same relative bodily proportions that a newborn baby has. The head, housing the miraculous brain, is quite large in proportion to the remainder of the body and the limbs are still relatively small. Within his watery world, however (where we have been able to observe him in his natural state by closed circuit x-ray television set), he is quite beautiful and perfect in his fashion, active and graceful. He is neither an acquiescent vegetable nor a witless tadpole as some have conceived him to be in the past, but rather a tiny human being as independent as though he were lying in a crib with a blanket wrapped around him instead of his mother."<sup>25</sup>

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<sup>24</sup>Granfield, *The Abortion Decision* (1969), p. 25.

<sup>25</sup>Liley, *Modern Motherhood* 26-27 (1967).

In District of Columbia medical circles, Dr. Hellegers has summarized the nature of the fetus during the first 12 weeks of its development as follows:

"After this second week of pregnancy the zygote rapidly becomes more complex and is now called the embryo. Somewhere between the third and fourth week the differentiation of the embryo will have been sufficient for heart pumping to occur, although the heart will by no means yet have reached its final configuration. At the end of six weeks all of the internal organs of the fetus will be present, but as yet in a rudimentary stage. The blood vessels leading from the heart will have been fully deployed, although they too will continue to grow in size with growth of the fetus. By the end of seven weeks tickling of the mouth and nose of the developing embryo with a hair will cause it to flex its neck, while at the end of eight weeks there will be readable electrical activity coming from the brain. The meaning of the activity cannot be interpreted. By now also the fingers and toes will be fully recognizable. Sometime between the ninth and the tenth week local reflexes appear such as swallowing, squinting, and tongue retraction. By the tenth week spontaneous movement is seen, independent of stimulation. By the eleventh week thumb-sucking has been observed and X rays of the fetus at this time show clear details of the skeleton. After twelve weeks the fetus, now 3-1/2 inches in size, will have completed its brain structure, although growth of course will continue. By this time also it has become possible to pick up the fetal heart by modern electrocardiographic techniques, via the mother."<sup>26</sup>

And the trial court judge's father, an eminent child psychologist, concluded thirty years ago that the development of the fetus reflects "mental growth" as early as the fourth week.<sup>27</sup>

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<sup>26</sup>Hellegers, *Fetal Development*, Vol. 31, No. 1, Theological Studies 7 (March, 1970).

<sup>27</sup>Gesell, *The First Five Years of Life* 11 (1940).

It is for these medical reasons that the *amici*, like other doctors practicing their profession in good faith, treat the fetus or unborn child as a second patient, different from the mother. This is acceptable medical practice and is almost universally done in obstetrics. It is, perhaps, the only area of medical practice where a doctor treats two patients at the same time, taking that unique fact into account in his treatment of both patients.

Ordinarily, we would see no point in belaboring the scientifically obvious. Life begins at either conception or six or seven days thereafter; very early in its development, and much before "quickening" is manifested, the fetus manifests a working heart and a brain different from and independent of the mother in whose womb he resides; and an unborn fetus is a living, human being. Finally, even if it were still open to dispute as to whether life begins at conception or shortly thereafter, it is universally agreed that life has begun by the time the mother realizes she is pregnant and asks her doctor to prescribe an abortion. The *amici* have indulged in this short compilation of undisputed medical opinion only out of their concern that the Court might be tempted to take up and decide constitutional issues of the greatest magnitude without the advantage of familiarity with the relevant modern medical facts most germane to any such determination. Now, before they turn to the question of whether any alleged evolving right of privacy on the part of married women to do with their bodies what they will is constitutionally protected from application of an abortion statute such as 22 D.C. Code 201 (1967), despite the unrefuted medical data establishing that the fetus is a living person within the womb at conception or very soon thereafter, *amici* briefly refer to other areas of the law in which the legal rules or principles applicable to the rights of the fetus have substantially changed in response to knowledge acquired from the evolving biological data supplied by ever-improving and enlightened medical and scientific research.

B. *The Law's Recognition of the Property Rights of an Unborn Child.* The first area where the rights of the unborn child, at all stages of fetal existence, were recognized by the law was in the realm of property law. In *Doe v. Clarke*, 2 H. Bl. 399, 126 Eng. Rep. 617 (1795), the court interpreted the ordinary meaning of "children" in a will to include a child in the womb: "An infant *en ventre sa mere*, who by the course and order of nature is then living, comes clearly within the description of 'children living at the time of his decease'." In *Thelluson v. Woodford*, 4 Ves. 227, 31 Eng. Rep. 117 (1798), the court rejected the contention that this was a mere rule of construction invoked for the benefit of the child: "Why should not children *en ventre sa mere* be considered generally as in existence. They are entitled to all the privileges of other persons." *Ibid.* at 323. To the argument that such a child was a nonentity it replied:

"Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian." *Ibid.* at 322.

When the English property rules were adopted by American courts, the same approach was taken. In *Hall v. Hancock*, 15 Pick. 255 (Mass., 1834), the issue was whether a bequest to grandchildren "living at my decease" was valid, and the court was asked to say that "*in esse*" was not the same as "living" and that for a child to be "living", the mother must be at least "quick".<sup>28</sup> Chief Justice Shaw held that a conceived child fell within the meaning of the language and quoted with approval Lord Hardwicke in *Wallis v. Hodson*, 2 Atk. 117;

<sup>28</sup>"Quickening" of the child means only that his presence in the womb is felt by the mother for the first time. Black's Law Dictionary 1415 (1951). "Quickening" served to prove the existence of life to common law men. Modern medicine now can prove the same existence long before it can be seen by the eye or felt by the mother.

"The principal reason I go upon is, that a child *en ventre sa mere* is a person in *rerum natura*, so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in the father's life-time."

In *In Re Well's Will*, 221 N.Y.S. 417 (1927), a trust fund originating from the estate of the deceased was to be divided into "as many parts as I have grandchildren living at the date of my decease." The decedent died on May 22, 1922; a granddaughter of the decedent was conceived on May 1, 1922. The granddaughter was held to be entitled to a share in the trust estate. See also *Swain v. Bowers*, 91 Ind. 307, 158 N.E. 598 (1927).

In the case of *La Blue v. Specker*, 358 Mich. 558, 100 N.W.2d 445 (1960), an unborn illegitimate child was held to be a child or "other person" having standing to bring suit under a dram shop act, for the death of his father, which had occurred before the child's birth. Quoting from *Ide v. Scott Drilling Co., Inc.*, 341 Mich. 164, 67 N.W.2d 133 at 135, the court in the *La Blue* case stated:

"For certain purposes, indeed for all beneficial purposes, a child *en ventre sa mere* is to be considered as born. . . . It is regarded as *in esse* for all purposes beneficial to itself, but not to another. . . . Formerly, this rule would not be applied if the child's interests would be injured . . . thereby, but for purposes of the rule against perpetuities such a child is now considered a life in being, even though it is prejudiced by being considered born. . . . *Its civil rights are protected at every period of gestation.*" (Emphasis supplied).<sup>29</sup>

The foregoing approach has not been a sentimental concession to the supposed benefit of some forgotten posthumous child. The rule has been applied even where its application benefited some third party, *Barnett v. Pinkston*, 238 Ala. 327, 191 So. 371 (1939), and also in cases where the child himself has been injured by the rule, *In re Sankey's Estate*, 199 Cal. 391, 249 P. 517 (1926), in which a child conceived

<sup>29</sup> 100 N.W.2d at 449.



but not born was held bound by a decree entered against the living heirs.

The English and American common law doctrine under which an unborn child is considered as a "child" or as "in existence" for purposes of inheritance and trusts has long been followed in the District of Columbia. *Craig v. Rowland*, 10 App. D.C. 402 (1897).<sup>30</sup>

These *amici* believe that it would be an ironic and an inexplicable perversion of both human and constitutional values if it were to be the law that the state has an interest in protecting the property rights of an unborn child, but has no constitutionally justifiable interest in regulating the circumstances and conditions under which such a child may be destroyed, *i.e.*, put out of existence and denied further life as a human being. Nor is it any answer to reply that the property rights of a fetus which are protected by the state are merely contingent and depend upon his having been born. It is only the *remedy*, not *the right*, which is contingent. Existence as an unborn child is the basis of the state's interest in granting and protecting the property rights of an unborn child. The fact that the child may not survive to enjoy those rights does not denigrate the state's interest or deny its authority to implement that interest by law, either as promulgated by legislatures or enunciated in judicial decisions. We should assume that the proposition would have special applicability when the state's interests and action are directed at insuring that the existence of life of the unborn child, and all such contingently enforceable property rights as he may possess, are not exterminated by his deliberate destruction, at least short of an overwhelming countervailing interest such as the protection of the life or health of another human being—the mother.

*C. Evolving Rights Afforded an Unborn Child by the Law of Torts.* Perhaps even more demonstrably so than in the case of purely property rights, including rights of inheritance, it is

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<sup>30</sup>The rule was recently applied in *Riggs National Bank v. Summerlin, et al.*, C.A. 187-69, Memo. Opinion (D. D.C., 1969).



in the law of torts where we witness a dramatic development, indeed, an abrupt change, of the law in response to expanding scientific knowledge and medical facts formerly unavailable.

Well into the twentieth century most American decisions denied recovery in tort to the human offspring harmed in the womb. The denial was based in part on the danger of fraudulent claims, in part on the difficulty of proving causation, but principally on the ground that "the defendant could owe no duty of conduct to a person who was not in existence at the time of his action", Prosser on Torts, Sec. 56 (1964). The theory followed was that succinctly expressed by Justice Holmes in *Dietrich v. Northhampton*, 138 Mass. 14, 17 (1884): "The unborn child was a part of the mother at the time of the injury."

There is no doubt of the sweeping nature of the reversal of the *Dietrich* doctrine that the unborn child is a part of the mother and therefore cannot sue for pre-natal injuries. Almost every jurisdiction which has considered the issue in the last 30 years has upheld the right of an infant to sue for injuries sustained prior to his birth. Prosser on Torts, Sec. 56; Gordon, *The Unborn Plaintiff*, 63 Mich. L.R. 579, 627 (1965). Moreover, it appears that a majority of jurisdictions now recognize that a wrongful death action may be brought for negligently inflicted injury to the unborn child resulting in its death, whether or not it was viable at the time of the injury, and whether born alive or still born. *Torrigan v. Watertown News Co.*, 352 Mass. 446, 225 N.E. 2d 926, 927 (1967); Harper and James, Torts, Sec. 18.3 (1956).

Many of the early cases required that the unborn child have reached the stage of viability (*i.e.*, capable of living outside of the mother's uterus) at the time the injuries were inflicted in order to maintain an action.<sup>31</sup> The modern trend,

<sup>31</sup> *Bonbrest v. Kotz*, 65 F. Supp. 138 (D. D.C., 1946); *Scott v. McPheeters*, 33 Cal.App.2d 629, 92 P.2d 678 (1939); *Tursi v. New England Windsor Co.*, 19 Conn. Supp. 242, 111 A.2d 14 (1955); *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951); *Keyes v. Constr.*

and more in accord with the medical facts, however, has been to reject any distinction based on viability and to allow recovery whenever the injury was received, provided that the elements of causation are properly established.<sup>32</sup>

The District of Columbia repudiated the notion that an unborn child must be considered as part of his mother and unable to sue for pre-natal injuries in *Bonbrest v. Kotz*, 65 F. Supp. 138 (D. D.C., 1946). Judge McGuire pointed out in that case that under the civil law and the common law of real property a child *en ventre sa mere* is regarded "as a human being . . . from the moment of conception—which it is in fact." Referring to the state of medical knowledge in 1946 and noting the resilient, unstatic features of the common law of torts, he found no difficulty in upholding the right of an unborn child to sue for damages in tort. 65 F. Supp. at 142.<sup>33</sup>

*Kelly v. Gregory*, 282 App. Div. 542, 125 N.Y.S. 2d 696, contains language which summarizes precisely the basis of the rejection on the part of modern tort law of the anti-

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*Serv., Inc.*, 340 Mass. 633, 165 N.E.2d 912 (1960); *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio 144, 87 N.E.2d 334 (1949); *Mallison v. Pomeroy*, 205 Ore. 690, 291 P.2d 225 (1955); *Seattle-First Nat'l Bank v. Rankin*, 59 Wash.2d 288, 367 P.2d 835 (1962).

<sup>32</sup>*Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956); *Daley v. Meier*, 33 Ill. App.2d 218, 178 N.E.2d 691 (1961); *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *Kelly v. Gregory*, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953); *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960); *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222, 223-24 (1966). "Viability" of a fetus is not a constant but depends on the anatomical and functional development of the particular baby. J. Morison, *Foetal and Neonatal Pathology* 99-100 (1963). The weight and length of the fetus are better guides than age to the state of fetal development, and weight and length vary with the individual. Gruenwald, *Growth of the Human Fetus*, 94 Am. J. Obstetrics and Gynecology 1112 (1966).

<sup>33</sup>"The battle in jurisprudence is almost over. Development of the infant's right of action has illustrated the inherent capacity of legal systems to adjust to new situations." Gordon, *supra* at 627.

quoted notion of the common law that an unborn child is merely part of his mother's body:

"We ought to be safe in this respect in saying that legal separability should begin where there is biological separability. We know something more than the actual process of conception and foetal development now than when some of the common law cases were decided; and *what we know makes it possible to demonstrate clearly that separability begins at conception.*

"The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe the conditions under which life will not continue." (Emphasis supplied.)<sup>34</sup>

The emergence of the rights in tort of unborn children is taken as a prime example of the effect of scientific development on law in the instructive book of Professor Patterson of the Columbia Law School — *Law In a Scientific Age* (1963). He concludes: "that the meaning and scope of even such a basic term as 'legal person' can be modified by reason of changes in scientific facts—the unborn child has been recognized as a legal person, even in the law of torts."<sup>35</sup>

The revolution in tort law has thus, by the majority rule, recognized rights in the fetus at every stage of life and has refused to condition recovery on survivorship. The dean of authorities on tort law notes that all writers on the subject have maintained "that the unborn child in the path of an automobile is as much a person in the street as the mother." Prosser on Torts, Sec. 56. Can such a child become less a person when, instead of an automobile, another agency is directed to his destruction? If the state may protect this person by court action awarding damages for tort, *a fortiori* it

<sup>34</sup> 125 N.Y.S.2d at 697.

<sup>35</sup> *Id.* at 5.

state cannot be impotent to protect the same living being by criminal sanctions.

**D. *The Law's Recognition of an Unborn Child's Right To Support.*** It is now established that the law will recognize an unborn child's right to support by his parents. *Kyne v. Kyne*, 38 Cal. App.2d 122, 100 P.2d 806 (1940), involved a suit brought by the guardian *ad litem* of a fetus against the natural father. At the time the suit was instituted, the unborn child was less than six months old. The court held that both the father and mother of such a child owed him the duty of support. See also *People v. Yates*, 114 Cal. App. Supp. 782, 298 P. 961 (1931). And see *People v. Estergard*, \_\_\_\_ Colo. \_\_\_\_, 457 P.2d at 698, 699 (1969).

If the law holds that a state has a sufficient justification to require a father to support an unborn child which he may not want, can it be fairly maintained that the state has no justifiable interest in protecting that child from extinction as a living being because his mother may not want him?

**E. *The Right of a Fetus To Life Has Been Preferred to His Parents' Free Exercise of Religion Rights.*** Since this Court's decision in *Board of Education v. Barnette*, 319 U.S. 624 (1943), it has been firmly settled that the Free Exercise of Religion rights guaranteed by the First Amendment (as incorporated in the Fourteenth Amendment) are "susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." 319 U.S. at 639.<sup>36</sup> Nevertheless, the right of an unborn child to life has served in several recent instances to permit the state's abridgment of or interference with a mother's religious convictions, when necessary to save the life of an unborn child. One case touching upon, but not deciding, the point recently was decided in the District of Columbia. In *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (C.A. D.C., 1964), *cert. den.*, 377 U.S. 978 (1964), the Court of Appeals upheld an order of the District Court authorizing a hospital to administer a blood transfusion

<sup>36</sup>Emphasis supplied.

to a woman patient who, on religious grounds, was unwilling to consent to the transfusion and where the husband also was unwilling to consent, where the transfusion was necessary to save her life. The adamant mother had a seven months old child at the time the terrible dilemma arose. In resolving this Hobson's choice, Judge Wright said:

"The child cases point up another consideration. The patient, 25 years old, was the mother of a seven-month-old child. The state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonment. The Patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother."<sup>37</sup>

More precisely in point is *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), *cert. den.*, 377 U.S. 985 (1964). There, a court was asked to decide whether the rights of a child in the mother's womb were violated by her refusal, on religious grounds, to submit to a blood transfusion necessary to preserve the lives of both. The New Jersey court found it unnecessary to decide whether an adult may be compelled to submit to medical treatment necessary to save his own life. However, the court had no difficulty, after finding a parity of rights possessed by both unborn and after born children, in deciding that the unborn child was entitled to the law's protection and ordering the transfusion. In sustaining the unborn child's right to life, even over his mother's right to practice her religion, the court said:

"In *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1963), we held that the State's concern for the welfare of an infant justified blood transfusions notwithstanding the objection of its parents who were also Jehovah's Witnesses, and in *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960), we held that a child could sue for injuries inflicted upon it prior to birth. We are satisfied that the *unborn child is entitled to the law's*

<sup>37</sup>331 F.2d at 1008.

*protection* and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time." (Emphasis supplied).<sup>38</sup>

Also worthy of relevant note in the context of a claim of a mother's right to freedom over the use of her body is *Gleitman v. Cosgrove*, 49 N.J. 27, 227 A.2d 689 (1967). In that case, the plaintiffs sought damages against doctors who had attended the mother during pregnancy. They alleged their child had been born with birth defects and that the defendants had negligently failed to warn the child's mother and father that an attack of German measles which she suffered during pregnancy might result in such defects. The failure to give the warning, it was alleged, deprived the parties of the opportunity of terminating the pregnancy. In affirming the trial court's dismissal of the complaint, the majority of the New Jersey Supreme Court emphasized the child's right not to be aborted, saying:

"The right to life is inalienable in our society . . . We are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not talking here about the breeding of prize cattle. *It may have been easier for the mother and less expensive for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life to support a remedy in tort.* Cf. Jonathan Swift. 'A Modest Proposal' in *Gulliver's Travels and Other Writings*, 488-496 (Modern Library ed. 1958).

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<sup>38</sup>201 A.2d at 538. This Court has had no trouble in sustaining as superior a state's interest in, and authority with respect to, children over their parents' free exercise of religion rights, noting that the "right to practice religion freely does not include liberty to expose . . . the child . . . to ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1943).

"Though we sympathize with the unfortunate situation in which these parents find themselves, we firmly believe the right of their child to live is greater than and precludes their right not to endure emotional and financial injury." (Emphasis supplied).<sup>39</sup>

The line of cases discussed in this section of *amici's* brief, all of which are based either impliedly or expressly on the findings of modern medical science concerning the nature of the fetus, are a recognition of the right of a child in the womb to the protection of the law. From this, a learned commentator has gone on to reason that:

"... it seems established by analogy that to remove the protection of the criminal law from the child in the womb would be itself an unconstitutional act. The civil rights cases have established that for the Government to fail to protect a class is itself an unconstitutional denial of civil rights."<sup>40</sup>

The Court need not go so far in upholding the District of Columbia abortion statute against the appellee's claim that it unconstitutionally interferes with alleged rights of privacy possessed by a woman. Nevertheless, the point has force. It serves to emphasize that in evaluating the legitimacy of such an alleged right of privacy the Court must take into counter-vailing account the fundamental right of an unborn child to be protected by the state from arbitrary and capricious destruction of its existence merely because it is unwanted.

*F. Life Should Be Preferred Over Privacy in Any Rational Hierarchy of Constitutional Values or Rights.* In the section of the brief which now follows we take up the judicial balancing that is necessarily involved in deciding whether or not 22 D.C. Code 201 is an unconstitutional invasion of privacy. In deciding the relative priority which the Constitution should afford, on the one hand, to a woman's right to des-

<sup>39</sup> 227 A.2d at 693.

<sup>40</sup> Noonan, *Amendment to the Abortion Law: Relevant Data and Judicial Opinion*, 15 *The Catholic Lawyer*, No. 2 (Spring, 1969).



stroy her unborn child and, on the other, to the right of that child to live, certain relevant facts are beyond argument. First, the medical evidence is unchallengeable—life begins at conception, or within seven days thereafter, and the fetus very early in its development has an animate existence, including a heart and a brain, separate and independent from his mother. Secondly, the common law has not been impervious to the findings of modern science in changing and adjusting its concepts and rules regarding the legal rights possessed by a child in the womb.

We might also add at this point that the approach taken by American law in recognizing important legal rights of an unborn child is not some national aberration explained, perhaps, by some latent puritanical instincts in American society alone. For example, in 1959 the United Nations adopted a "Declaration of the Rights of the Child" which supplemented the United Nations' statement entitled the "Universal Declaration of Human Rights". One reason for this supplementary declaration, as stated in its Preamble, was because, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". General Assembly of the United Nations, "Declaration of the Rights of the Child", adopted unanimously in the plenary meeting of November 20, 1959, *Official Records of the General Assembly*, 14th Session, pp. 19-20. Thus, the representatives of most of the civilized nations of the world recognized that the being before birth deserved recognition as a "child". They further recognized that a child, so defined, needed special legal protection. The committee report on this declaration noted that "representatives of the most diametrically-opposed social systems find common ideals in discussing the privileges of childhood". *Report of the Third Committee of the General Assembly, Official Records*, 14th Session, p. 593. The committee thus underlined that the rights asserted by the United Nations as applicable to the fetus represented a commitment which had commended itself to all of the various social systems represented within that worldwide body.



If, then, an unborn child can inherit by will and by intestacy, be the beneficiary of a trust, be tortiously injured, be represented by a guardian seeking present support from the parent, be preferred to the religious liberties of his parents, be protected by the criminal statutes on parental neglect, and enjoy the specific concern of the United Nations' General Assembly, are there not interests here which the state may guard from intentional extinction?

Let us then address ourselves specifically to the question of balancing the two rights which may appear to be in conflict in this case. That question must be: To what extent can the state protect the right of an unborn infant to continue its existence as a living being in the face of a claim of right of privacy on the part of a woman to decide whether or not she wishes to remain with child?

*Amici* will assume *arguendo* that the Constitution protects certain rights of privacy on the part of a woman arising from the marital relationship which cannot be unjustifiably interfered with by the state. They also believe that the genesis of such rights, to the extent such rights may exist, must be found among the "penumbral" personal liberties protected by the Due Process Clause of the Fifth Amendment. Yet equally unchallengeable is the proposition that an unborn child's right not to "be deprived of life", to quote the words of the Due Process Clause itself, is also a fundamental personal right or liberty protected by that same amendment and entitled to the traditional searching judicial scrutiny and review which is afforded when basic personal liberties are threatened by state action, whether legislative or judicial in character. Therefore, it is very clear that this case is not one, as the appellee would portray it, which involves merely the balancing of a right of personal liberty (*i.e.*, a married woman's privacy) against some competing state interest of lower priority or concern in an enlightened scheme of constitutional values, such as the state's police power, its authority to promulgate and enforce the criminal law, its right to protect the public health, *etc.* Rather, the

choice here is between a nebulous, and as yet unrecognized, legal "right" of privacy on the part of a woman with respect to the use of her body and the state's right to prevent the unjustifiable destruction of a human life. Accordingly, the appellee's complaint of the alleged "over breadth" of the District of Columbia abortion statute has no relevancy to the decision. The issue is purely a determination as to which of two *personal* rights or liberties the state has elected to prefer in particular circumstances where those rights come into conflict and if, under such circumstances, that judgment is a prohibited exercise of legislative power.

There would be no question of the answer, of course, if the choice were between a woman's "right to privacy" and the destruction of an unwanted *after* born child. Yet there is a point at which abortion may approach infanticide. The recent findings of medical science now suggest that this point is reached, at least from a medical, if not a legal, point of view, very early in a woman's pregnancy and in the life of the unborn child within the womb. Acting in this troublesome area, Congress has chosen, in the words of Judge Arnold, to effect "a compromise between morals and hygiene far in advance of the law in most jurisdictions", a majority of which still permit abortion only to save the life of the mother. *Williams v. United States*, 138 F.2d at 83. Contrary to the appellee's assumption, the state's interest in regulating abortion, as it has done in 22 D.C. Code 201, is not bottomed exclusively on concern for the health of the mother, a concern which admittedly would be of less than persuasive effect, since it cannot be successfully established that abortions during the early period of pregnancy performed by competent physicians in hospital surroundings represent a substantially high medical risk to the life and health of the mother.<sup>41</sup> The state interest which

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<sup>41</sup> *Amici* have one grave reservation here, however. Evolving research into the complications that may follow abortion indicate a 2% sterility rate with an approximate 10% rate of moderate or severe psychic sequelae. Hellegers, *Abortion, the Law, and the Common Good*, 3 Medical Opinion and Review, No. 5 (May 1967). Indeed, respect-

justifies what the Congress has done rests on a concern for human life, even though that life be within the womb of the mother. The separate, early and independent existence of such life has now been proven by medical science. While it may be impossible for the state to insist on the protection of such a life under all circumstances, can it seriously be maintained that the government is powerless to insist on protecting it from intentional destruction, absent danger to the mother's life or health?

The exception which the D.C. statute permits for the preservation of the mother's life is a reasonable consideration which justifies the state in permitting abortion for this purpose. "In the rare case where choice must be made between them, reason cannot demand that the mother must prefer her unborn child's life to her own." Noonan, *The Constitutionality of Regulation of Abortion*, 21 Hastings L.J. 51, 60 (1969). The second exception authorized by the D.C. Code in the interests of preserving the health of the mother is more difficult to defend in the light of *amici's* major medical premise, *i.e.*, that an unborn child is a living human being separate and apart from his mother. Yet, here also there is analogy to be found in the usual rule of criminal law which treats as justifiable homicide, killing done to repel a threat of substantial bodily injury. Thus, where a pregnancy constitutes a threat to the duration of the life of a mother by grave impairment of her health, there is a conflict between her interests in being free of such impairment and the fetus' interest in life. The statutory resolution of that conflict is not clearly unreasonable.<sup>42</sup> At any rate, no such conflict is presented by the record here, nor is the reasonableness of the statute in resolving it an issue in this case.

able studies raise the question of whether the guilt complex evoked by an abortion may itself constitute a more severe psychiatric problem than any pre-existing mental health problem serving to justify the abortion in the first instance. Rosen, *Therapeutic Abortion, Medical, Psychiatric, Anthropological and Legal Considerations* (1954).

<sup>42</sup>Noonan, *supra* at 61.

Under the analysis set out above, the appellee's argument in support of a woman's "sovereignty . . . over the use of her body" quickly withers. Either (1) it means that she has a "private right" or personal freedom which permits her to decide, for any reason whatsoever, whether to sustain and support, or whether to eliminate, a life which she alone may decide is unwanted; or (2) it means that she has some kind of right to bodily integrity which permits her and her alone to decide under all circumstances whether either to retain, or permit to be destroyed, a function or organism contained within her own body.

In all fairness we doubt that the first is the correct understanding of the basis of the "private right of personal freedom" for which appellee contends. For, were that principle ever to be accepted as the law, there would have crept into the Constitution a potentially terrifying principle that, with very little more logic than the appellee has relied upon to sustain his position in this case, would equally justify infanticide and euthanasia, at least if the victims were those in a relationship of dependence with the person or persons who wished to destroy them. Nor would the laws which forbid abandonment, failure of support, child neglect, *etc.*, be immune from attack.

However, we believe that the appellee means only to maintain that a woman has a right to an integrity of her body sufficient to permit her alone to decide, for whatever reason, whether to terminate a pregnancy. There are no decisions of this Court which suggest the existence of such an unrestricted right of bodily integrity. For example, it decided in *Schmerber v. California*, 384 U.S. 757 (1966), that it was not unconstitutional to require the forcible extraction of blood from a drunk driving suspect. Other courts have upheld police-supervised forcible rectal examinations, extraction of urine, and administration of emetics on criminal suspects. *Annotation*, 16 Law Ed.2d 1332, 1338-43 (1967).<sup>43</sup>

<sup>43</sup>See also the *Georgetown College* and *Raleigh Fitkin* cases discussed *supra*, pp. 34-36; cf. *Babbitz v. McCann*, 306 F. Supp. 400 (E.D. Wisc., 1969), *app. pend.*, No. 297, October 1970 Term.

We show in the next subsection of this brief that the one decision on which appellee might rely, at least by attenuated analogy, to support his claim of the unfettered right of a married woman to terminate a pregnancy does not support the proposition in whose behalf it is summoned. Apart from that, however, we do not believe that it can successfully be maintained that the District of Columbia abortion statute, and the balancing between any alleged right of privacy and the right of an unborn child to life which it attempts to effect, can be struck down as unconstitutional. To reach the contrary result would require this Court's unabashed return to the long-repudiated concept of substantive due process which plagued its decisions for several generations, albeit in another context, *i.e.*, economic and social legislation. The fact that a law might not impress the judiciary as a good law, or might even appear on the silly side to them, no longer can serve as a basis for its invalidation.<sup>44</sup> There is no doubt that many doctors, many women and many citizens might regard the District of Columbia statute on abortion as illiberal, outmoded and inconsistent with the law's emancipation of women. Such a view may enjoy significant popular appeal, although a recent national poll on the subject indicates that it is not a majority view.<sup>45</sup> However, at this stage of American constitutional development we don't have to remind the Court that the predilections of the populace, even those of its most enlightened members, much less the individual preferences of judges, cannot serve as a basis to strike down legislation within the competence of the state to enact, especially where the legislation thus challenged is aimed at protecting the most fundamental of personal liberties protected by the Due Process Clause, *i.e.*, the right not to "be deprived of life".

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<sup>44</sup>Compare *Lochner v. New York*, 198 U.S. 45 (1905), with *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

<sup>45</sup>"On an overall basis, the country is 50-40 percent opposed to the passage of state laws 'permitting abortion for almost any reason'." *Washington Post*, June 22, 1970, p. C-6.

G. *No Precedents of This Court Afford a Basis for Preferring Privacy Above a Right to Life.* Appellee states and purports to rely on the undisputed proposition "that the Constitution protects certain privacy and family interests from government intrusion unless a compelling substantial interest exists for the legislation."<sup>46</sup> These *amici* have demonstrated the medical basis which supports the "compelling substantial interest" reflected in the District of Columbia abortion statute. Beyond that, however, they dispute the contention that a woman enjoys any right of privacy, as yet recognized in American law, which vests in her alone authority to terminate a pregnancy for any reason whatsoever.

Certainly, no precedents of this Court have gone so far. Of the decisions relied on by the appellee, all but one are manifestly insufficient to establish the existence of such a formidable and unabridgeable alleged right of privacy. For example, *Loving v. Virginia*, 388 U.S. 1 (1967), cited by the appellee, held that a state anti-miscegenous marriage statute violated the Equal Protection Clause of the Fourteenth Amendment. 388 U.S. at 12. As a supporting ground for its decision, the Court also found that such statutes deny due process, since "the freedom of choice to marry [can] not be restricted by invidious racial discrimination." *Ibid.* *Loving*, therefore, is no precedent in support of the appellee's notion of the extreme scope of a woman's constitutional right of privacy. It is purely an invidious racial discrimination holding.

Other cases on which the appellee relies must similarly fail in their role as alleged analogies for his position. *Skinner v. Oklahoma*, 316 U.S. 535 (1942), decided that the compulsory sterilization of some types of habitual criminals and not others represented an invidious discrimination condemned by the Fourteenth Amendment. Thus, *Skinner* is most accurately read as a case prohibiting the imposition of unreasonable impediments on the right to procreate and, in any event, cannot logically be stretched to serve as any

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<sup>46</sup> Appellee's Motion To Affirm, p. 26.

analogy for the unrestricted right to abort. Likewise missing the mark as a supporting precedent is *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). This was the Court's landmark decision upholding, over the requirements of a state's compulsory school attendance law, the freedom of parents, guaranteed by the Due Process Clause of the Fourteenth Amendment, "to direct the upbringing and education of [their] children . . . ." 268 U.S. at 534. Once more, the liberty which was protected in the *Pierce* case was not a "right of privacy" and again the legislation which was struck down had "no reasonable relation to some purpose within the competency of the State." 268 U.S. at 535.

When the obviously unanalogous authorities tendered by the appellee are put aside, he is left only with *Griswold v. Connecticut*, 381 U.S. 479 (1965), as the one slim reed of alleged precedent to which he clings in arguing for the awesome right of privacy which he would have the Court enunciate in this case. That decision, too, is insufficient to carry such a heavy burden. The *Griswold* case produced a number of opinions by the Justices of this Court, concurring and dissenting. The actual holding in the case, however, was that a statute which forbade the use of contraceptives by married couples violated a "penumbral" right of marital privacy, older than the Bill of Rights and one falling within a "zone of privacy created by several constitutional guarantees." 381 U.S. at 485. Three of the Justices who decided that case, two dissenting and one concurring, refused to recognize any constitutionally protected right of privacy whatsoever. The remaining six Justices agreed only that a law, the enforcement of which would require the invasion of the marital bedroom, transgressed on the intimacies of, and the right of privacy inherent in, the marital relationship.

The particular aspect of the marital relation with which the Connecticut statute at issue in *Griswold* interfered was the sexual relationship. The state made it criminal for a married couple to have sexual intercourse using contraceptives. Enforcement of the statute would have required actual invasion of the marital bedchamber. The Connecticut law



challenged was more stringent and sweeping than any statute, civil or ecclesiastical, in the history of social efforts to control contraception. Noonan, *Contraception* 491 (1965). In contrast, 22 D.C. Code 201 does not affect the sexual relations of husband and wife. Pregnancy does not interfere with these relations except under some circumstances at limited times; indeed some women are more desirous of intercourse in pregnancy. Guttmacher, *Pregnancy and Birth* 86 (1960).

Further, it is a distortion of both the "penumbral" and Ninth Amendment approaches relied on by the majority in *Griswold* to assert them as a basis for challenging state regulation of abortion as unconstitutional. Centuries of judicial and legislative history refute the argument that the unrestricted right to abort is an "emanation" of any specific guarantees of the Bill of Rights necessary to give them "life and substance". 381 U.S. at 484. Where, for example, after considering the "traditions and [collective] conscience of our people", will this Court find the right to unrestricted abortion a principle "so rooted [there] . . . as to be ranked as fundamental"? 381 U.S. at 493 (Goldberg, J. *concurring*). Rather, in the words of a state court on the subject, the tradition has been that: "Unnecessary interruption of pregnancy is universally regarded as highly offensive to public morals and contrary to public interest." *Miller v. Bennett*, 190 Va. 162, 169, 56 S.E.2d 217 (1949).

In relying on the *Griswold* case, the appellee never considers that in this case, as opposed to that decision, there is another important interest at stake, the life of an unborn child. If, despite all the medical evidence on the point, the unborn child is not to be considered a juridical personality with legally protectible interests, then *Griswold* could be regarded as a precedent for the result that the appellee urges this Court to reach. On the other hand, if terminating pregnancy is something different from preventing it, if abortion is different from cosmetic surgery, if the fetus is not in the same class as the wart, and if we are dealing with something other than an inhuman organism, then *Griswold* is



totally inapposite. Even if the fetus is not fully the equivalent of the born child, the law, through centuries of judicial decision and legislation, and following the lead supplied by medical science, has raised the equivalency of that life to such a status that the unborn child may not be deprived of it, absent the demonstrated necessity of protecting a reasonably equivalent interest on the part of the mother. *Griswold*, of course, presented no such conflict and therefore is not controlling in this case.

Finally, we call the Court's attention to the fact that at common law abortion, at least after "quickening", was a form of homicide. 2 Bracton, *De Legibus et Consuetudinibus Angliae* 278-79 (Twiss ed. 1879). The "quickening" requirement originated with Coke and was predicated on the limited, inadequate and erroneous medical knowledge of his day. "Quickening" was the first manifestation of animate life within the womb of which common law men could be certain. However, as early as 1803, when the first English statute on abortion was passed, the requirement of "quickening" was removed and all abortions were prohibited, although the penalties were more severe if the abortion was performed after the fetus had quickened. Miscarriage of Women Act (1803), 43 Geo. 3 c. 58. Any proposition holding that, by virtue of passage of the Ninth Amendment, there was reserved to pregnant women a "penumbral" constitutional right to abort for any reason whatsoever on the ground that such a "right" was a fundamental liberty, recognized before the Bill of Rights, and retained by them is without any basis in history or in either British or American constitutional development. Far from considering it a "right", the common law treated abortion as a serious criminal act. And as soon as medical science had proved that an animate organism existed in the womb prior to "quickening", the Parliament quickly adapted the findings of that science as the basis of the abortion statute which it passed in 1803, *supra*.

Thus, on any fair analysis, the appellee's alleged precedents, including *Griswold*, furnish no support for his claim that there is a constitutional basis for a woman's right of

privacy in aborting, for any reason, an unborn child which she does not want.

#### IV.

#### THE REMAINING ARGUMENTS ADVANCED BY THE APPELLEE ARE WITHOUT MERIT

In addition to his major claim that the statute involves a woman's "right of privacy", appellee argues that First Amendment and Equal Protection considerations, as well as concern for the public welfare, require invalidation of 22 D.C. Code 201. *Amici* deal briefly with these contentions in this concluding section of their brief.

A. *The Statute Does Not Abridge a Doctor's First and Fifth Amendment Rights.* Appellee makes a weak pass in attempting to assert a First Amendment right in this case. He argues that the "present action has First Amendment implications, namely the right of a physician to provide medical information, followed by treatment of his patients . . . ." <sup>47</sup> The dispositive answer to such a contention is that the defendant was indicted not for speech, or even for giving medical advice, but for the commission of a criminal act, an abortion barred by the statute. If, as *amici* maintain, such an abortion is one within the competency of the District of Columbia to proscribe as criminal conduct, then the argument is closed. A criminal act does not fall within the "freedom of speech" which the First Amendment protects. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 498 (1949). On the other hand, if the *amici* are wrong and the District of Columbia statute represents an unconstitutional invasion of a woman's right to privacy, the appellee's free speech argument becomes superfluous. Apart from that, however, Dr. Vuitch cannot seriously argue that the District of Columbia abortion statute is vulnerable on its face as abridging his, or anyone else's, right of free expression.

The identical rationale also answers the defendant's claim that his "general liberty under the Fifth Amendment to

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<sup>47</sup> Appellee's Motion To Affirm, p. 20.

practice his profession free from unconstitutional restraint" is offended by the statute. Compare, *e.g.*, *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 44 (1961), with *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102-03 (1963).

*B. Nor Does the Statute Effect Any Invidious Discrimination Between Rich and Poor.* It does not appear that the appellant complained below that the abortion statute violated the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, in his motion to affirm he argued that the abortion statute, as interpreted, denies "abortions to the poor, thus adding a gross factor of statutory discrimination to those hardships which the government is otherwise trying to correct."<sup>48</sup>

We doubt that this contention rises to the level of a constitutional argument which must be dealt with in this case. If it were necessary, we would point out that the statute on its face applies to all persons committing the acts condemned by the statute and that there is no suggestion that it seeks to discriminate on any invidious basis, including that of income. Of course, departing from the facts of the case, it might be argued more generally that (1) the poor woman finds it more difficult than a rich woman to leave the District in order to get an abortion in a jurisdiction where it might be legal, and (2) she cannot afford treatment by a private physician who, some might say, would be more inclined to find a legal reason for the abortion. Hence, it might be argued that the statute bears unequally upon the poor. The same theoretical argument could be made of many types of conduct proscribed by the criminal law of the District of Columbia. There are jurisdictions to which wealthy persons may travel in order to indulge in the doubtful pleasures of gambling at will, using narcotics without restraint, and enjoying a plurality of wives. Could this doubtful "advantage" on the part of the rich be relied on as any basis to set aside

<sup>48</sup> Appellee's Motion To Affirm, p. 39.

the criminal statutes of the District of Columbia proscribing such activities within the jurisdiction?

And even if it were assumed to be true that the rich are more likely than the poor to secure the services of a sympathetic physician for purposes of terminating an unwanted pregnancy, such a result, unintended by the statute, would not rise to the level of a constitutional infirmity. "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949). If the statute is to fail, it must be shown that on its face it takes away a right guaranteed to the poor by the Constitution. *Fisch v. General Motors Corp.*, 169 F.2d 266, 270 (C.A. 6, 1948). No such showing is possible in this case.

Along with many others, these *amici* lament the fact that Anatole France's sardonic comment about the "majestic equality" of the law much too often has proved to be true. There is no question that many criminal laws in actual practice bear with unequal severity upon the poor. It is they who are more likely than the rich to be caught, to be unable to post bail bond, to be prosecuted, to be unskillfully defended, to be convicted and to be punished. However, the remedy for these injustices of our society lies in the elimination or mitigation of the conditions and causes of poverty and in the reform of the administration of criminal justice, not by the selective invalidation of otherwise lawfully enacted criminal statutes. The District of Columbia abortion statute is not directed against the poor, as opposed to the rich, but against practitioners of illegal abortion who perform their invidious services for a substantial price. It would seem, therefore, that the appellee is in as peculiarly unworthy a position to assert alleged constitutional rights possessed by the poor as he is to champion the alleged constitutional rights of pregnant women in the District of Columbia.

*C. Their Persuasiveness Apart, Appellee's Common Good Arguments Are Misplaced.* At the finish the appellee argues, unsurprisingly, that the statute is a bad one from the point

of view of the public welfare. He contends that the D.C. abortion statute forces women often to go to non-medical practitioners for the performance of abortions which are not conducted under proper hygienic conditions.<sup>49</sup> Next, he calls attention to the grave problem of overpopulation, both on a national and worldwide scale.<sup>50</sup>

The efficacy of these arguments is very questionable, but, in any case, their assertion here is misplaced. They should be directed to the Congress, not to this Court. Certainly, in recent years legislative bodies have not been hostile to the idea of revising their abortion statutes.<sup>51</sup>

Even if such arguments were addressed to a legislative body, these *amici* would dispute their persuasiveness. For example, Sweden, a country not unlike ours, and the nation which has had the longest experience with state-regulated abortions in Western Europe, has produced no evidence that criminal abortions, estimated at 20,000 a year when the law was passed in 1938, have been substantially reduced since that time. Uhrus, *Some Aspects of the Swedish Law Governing Termination of Pregnancy*, *The Lancet* 1292 (1964). Other studies confirm the belief that liberalization of abortion laws effect no reduction in the rate of criminal abortions and all that is done is to increase the total number of abortions. "Thus it is not unlikely that liberalization may increase rather than decrease maternal mortality." Cavanagh, *Reforming the Abortion Laws: A Doctor Looks at the Case*, *America*, April 18, 1970, p. 408. Secondly, so far as

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<sup>49</sup>*Id.* at 40. However, recent reliable statistics show a significant annual decline, both nationwide and in the District of Columbia, of deaths caused by abortion. Hellegers, *supra* at 90.

<sup>50</sup>*Id.* at 41.

<sup>51</sup>For example, New York recently enacted an abortion statute which permits abortion for any reason within 24 weeks from the commencement of pregnancy. That act became effective on July 1, 1970. *New York Times*, July 2, 1970, p. 1. Laws almost, but not quite, as liberal as the New York statute have recently been approved in Alaska and Hawaii.

the problem of overpopulation is concerned, an abortion, whether on the free demand of a woman or on the intimidating command of the state, appears to us as a completely ineffective and, indeed, an extremely dangerous, way to attempt to solve that problem, at least in the context of values traditional to Western civilization. For instance, one side effect of the repeal of abortion statutes and the fostering of abortion through state auspices is that no group will be more likely to feel the sting more bitingly than the mothers of illegitimate children. Already, laws making the birth of illegitimate children a crime suggest the squeeze to which the poor mother might be subjected in an age of unrestricted, and state-sponsored, abortion.<sup>52</sup> However, this Court is not the forum, and this case is not the occasion, to determine whether unrestricted abortion would best serve the general welfare of the people of the District of Columbia. Such a debate, if it must come, will be for the Congress to decide, not this Court.

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<sup>52</sup>E.g., La. Rev. Stat. Ann. § 14.79.2; see Noonan, *Freedom To Reproduce: Cautionary History, Present Invasions, Future Assurance*, Biennial Conference on the "Control of One's Own Body", New York University, New York (1970).

**CONCLUSION**

For the reasons stated in their brief, the *amici* join the United States in urging that the Court reverse the judgment of the District Court and remand the cause for the reinstatement of the indictments against the appellee.

Respectfully submitted,

**ALFRED L. SCANLAN**

734 Fifteenth Street, N. W.  
Washington, D.C. 20005

Of Counsel:

**SHEA & GARDNER**

734 Fifteenth Street, N.W.  
Washington, D.C. 20005

**THOMAS J. FORD**

117 Pennsylvania Avenue  
Brooklyn, New York 11207

**JOSEPH V. GARTLAN, JR.**

815 Connecticut Avenue  
Washington, D.C. 20006

**GARY R. ALEXANDER**

4400 Stamp Road  
Marlow Heights, Maryland 20031

*Attorneys for the Amici Curiae*

July 14, 1970

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1970**

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**No. 84**

**UNITED STATES, APPELLANT**

**v.**

**MILAN VUITCH**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA**

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**BRIEF FOR THE UNITED STATES**

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## **OPINION BELOW**

The memorandum opinion of the United States District Court for the District of Columbia (App. 5-10) is reported at 305 F. Supp. 1032.

## **JURISDICTION**

On November 10, 1969, the District Court entered orders (App. 11-12) granting appellee's pre-trial motion to dismiss the indictments against him, on the ground that a portion of the statute upon which the indictments were founded (22 D.C. Code 201) was unconstitutionally vague. Notices of appeal were filed in the district court on December 10, 1969 (App. 13<sup>1</sup>).

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<sup>1</sup>Only one of the two notices of appeal is included in the Appendix.

On April 27, 1970, this Court issued an order (App. 14) postponing consideration of the question of jurisdiction in this case to the hearing on the merits. On June 29, 1970, the Court issued a further order requesting the parties to brief and argue specified questions (incorporated in questions 1 and 2 below) concerning the jurisdictional issue.

#### **QUESTIONS PRESENTED**

1. Whether this Court has jurisdiction under the Criminal Appeals Act, 18 U.S.C. 3731, to entertain a direct appeal from a decision of the United States District Court for the District of Columbia dismissing an indictment on the ground of the invalidity of the statute on which the indictment is founded, where the statute, although an act of Congress, applies only in the District of Columbia.

2. Whether the district court's decision in this case could have been appealed to the Court of Appeals for the District of Columbia Circuit pursuant to 23 D.C. Code 105 and, if so, whether this Court should, as a matter of sound judicial administration, abstain from accepting jurisdiction pursuant to 18 U.S.C. 3731 because the case involves the validity of a statute the application of which is confined to the District of Columbia?

3. Whether the phrase "necessary for the preservation of the mother's life or health" contained in the District of Columbia abortion statute is unconstitutionally vague on its face.

#### **STATUTES INVOLVED**

18 U.S.C. 3731 provides in pertinent part:

An appeal may be taken by and on behalf of

the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

\* \* \* \* \*

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

\* \* \* \* \*

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

The Act of March 3, 1901, c. 854, 31 Stat. 1189, 1341, Section 935 (23 D.C. Code 105(a) (Supp. III, 1970)) provides:

In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of



exceptions: *Provided*, That if on such appeal it shall be found that there was error in the rulings of the court during a trial, a verdict in favor of the defendant shall not be set aside.

The Act of March 3, 1901, c. 854, 31 Stat. 1189, 1322, Section 809, as amended by Act of June 29, 1953, c. 159, 67 Stat. 90, 93, Section 203 (22 D.C. Code 201) provides in pertinent part:

Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; \* \* \*.

#### STATEMENT

Separate and unrelated indictments were returned in the District of Columbia charging appellee, a licensed physician, and Shirley Boyd, a nurse's aide, with violations of the District of Columbia abortion law, 22 D.C. Code 201.<sup>2</sup> Each defendant made a pre-trial motion to dismiss, and the district court consoli-

<sup>2</sup> Two indictments were returned against appellee (App. 2-3), each in two counts. One indictment charged him with procuring or producing an abortion on one Inez Fradin on or about February 1, 1968 and with attempting to procure or produce the same abortion. The other indictment charged similar offenses on May 1, 1968, as to one Nancy Russell.

dated the cases.<sup>3</sup> After receiving briefs and hearing argument, the court dismissed the indictments against appellee but denied the motion to dismiss as to Miss Boyd.<sup>4</sup>

Noting the statutory phrase "necessary for the preservation of the mother's life or health", and that the word "health" itself was nowhere defined in the statute, the district court was of the view that the word health was "so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health" (App. 7). The court further found that the physician contemplating the performance of an abortion was placed in a "particularly unconscionable position" in the light of interpretations of the statute by the District of Columbia Court of Appeals to the effect that once the government proves that an abortion had been performed by a physician, the burden shifts to the physician to justify his acts. Given

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<sup>3</sup> Appellee's motion was based upon the decision in *People v. Belous*, 80 Cal. Rptr. 354, 458 P. 2d 194, certiorari denied, 397 U.S. 915, in which a divided court held that the statutory exception to the scope of California's then applicable provision prohibiting abortions "unless the same is necessary to preserve [the woman's] life" was unconstitutionally vague.

<sup>4</sup> The district court refused to dismiss the indictment as to non-physician Boyd on the ground that there was "ample evidence \* \* \* that infection and death still often attend clumsy, unskilled terminations of pregnancy performed by non-physicians" and, accordingly, that "it was and still is well within the police power of the Congress to outlaw abortions that are not performed under a 'competent', that is, a qualified, licensed practitioner of medicine" (App. 6-7). The court found the statute's proscription of abortions by non-physicians severable from the portion found to be infirm (App. 8-9).

this interpretative gloss on the statute, the district court concluded that (App. 7):

[The physician] is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health. \* \* \* The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word "health" should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court.

In addition the court noted (App. 8) that other uncertainties in the act's phraseology had been fully analyzed in *People v. Belous*, 80 Cal. Rptr. 354, 458 P. 2d 194, certiorari denied, 397 U.S. 915.

In reaching its decision that the "necessary for the preservation of the mother's life or health" portion of the abortion statute was unconstitutionally vague, the court did not pass on the other constitutional attacks on the statute. Noting in passing that the statute "unquestionably impinges to an appreciable extent on significant constitutional rights of individuals" and that the right of privacy as delineated in recent opinions of this court might well include the right to remove an unwanted child in the early stages of pregnancy (App. 8), the court acknowledged that the "unqualified right to refuse to bear children" has limitations and that Congress could undoubtedly regulate abortion practice in "many ways" (App. 9-10).

## ARGUMENT

## INTRODUCTION AND SUMMARY

In declaring part of the District of Columbia abortion statute unconstitutionally vague, the district court has created a situation where any licensed physician in the District of Columbia may perform an abortion on a pregnant woman who desires it for any reason whatsoever. The unconditional availability of abortions, unrelated to medical justification, is contrary to the manifest intent of Congress in enacting the instant statute and is at odds with the abortion statutes of many States. It is therefore important for this Court to review the decision of the district court.

## A

Our examination of the history of the Criminal Appeals Act and the decisions of this Court has led us to conclude that the Court has jurisdiction over this appeal. The explicit language of the Act coupled with dicta in *Carroll v. United States*, 354 U.S. 394, 411, make clear that the Act encompasses appeals from the District Court for the District of Columbia. Furthermore, we are of the opinion that the term "statute" in the Act clearly applies to the District of Columbia abortion statute adopted by Congress in 1901. No basis exists for exempting from the coverage of 18 U.S.C. 3731 legislation passed by Congress and approved by the President, but applicable only to the District of Columbia. This Court's recent decision in *Shapiro v. Thompson*, 394 U.S. 618, holding that the term "Act of Congress" as used in the three-judge court statute, 28 U.S.C. 2282, encompasses acts of

Congress applicable only to the District of Columbia is dispositive. The term "statute" in the Criminal Appeals Act is certainly at least as broad as the phrase "Act of Congress" in the three-judge court statute.

Although *Carroll v. United States*, *supra*, 354 U.S. at 411, had seemed to settle that, where applicable, the "explicit terms" of the Criminal Appeals Act would govern to the exclusion of the general District appeals statute, 23 D.C. Code 105, the Court's recent decision in *United States v. Sweet*, No. 577, O.T., 1969, decided June 29, 1970, has cast some doubt on the issue with respect to appeals involving the validity of statutes applicable only in the District of Columbia. *Sweet* seems to hold that, in such a case, the Criminal Appeals Act does not supersede the D.C. Code provision and that an appeal taken pursuant to the local statute to the Court of Appeals for the District of Columbia Circuit cannot be transferred here. We submit, however, that once a direct appeal covered by the Criminal Appeals Act is properly filed here, this Court must accept jurisdiction, lacking any discretionary power to transfer or dismiss the appeal.

### B

While we believe this court has jurisdiction, we note at the outset that the traditional restraint exercised by this Court in deciding constitutional questions and the narrow scope of review authorized by the Criminal Appeals Act, 18 U.S.C. 3731, both operate to limit the issues properly before this Court. Although several broad constitutional issues were presented to the court below by an *amicus curiae*, see

*infra*, pp. 22-23, the district court's decision was based solely on a finding that the abortion statute was unconstitutionally vague. In view of this Court's conclusions in *United States v. Automobile Workers*, 352 U.S. 567, 589-590, we argue that it would be inappropriate to reach the broader issues not fully considered below and not presented in the context of a fully developed factual record. We also discuss decisions under the Criminal Appeals Act which raise substantial questions as to this Court's jurisdiction to consider such broader issues.

Turning to the vagueness issue decided by the district court, we believe it was error to declare the abortion statute unconstitutional on its face where there may well exist a substantial class of situations to which the statute may apply and where the record does not disclose whether appellee had any doubts as to whether his conduct was proscribed by the statute. This case is not within the reach of *Dombrowski v. Pfister*, 380 U.S. 479, and other First Amendment cases where overbroad statutes were struck down for their "chilling effect" on the rights of free expression of third parties. Before finding the phrase "necessary for the preservation of the mother's life or health" lacking in adequate precision, the district court should at least have awaited clarification as to whether appellee made a medical judgment that the abortion he allegedly performed was necessary to preserve the mother's health.

On the merits, we suggest that the District of Columbia abortion statute should be interpreted to allow a defense of good faith on the part of the physician

performing an abortion. While a decision of the Court of Appeals for the District of Columbia Circuit goes so far as to note that as a practical matter the good faith of a physician will always create a reasonable doubt as to whether the statutory standard was violated, *Williams v. United States*, 138 F. 2d 81, we suggest that this Court should make clear that good faith is a complete defense. Such a ruling would effectively shield doctors performing abortions from prosecution as long as they made a good faith professional judgment that the abortion was justified.

Finally, when the District abortion statute is interpreted so as not to interfere with a physician's good faith judgment, the phrase "necessary for the preservation of the mother's life or health" is not fatally defective. The word "health" distinguishes this case from the statute found unconstitutionally vague in *People v. Belous*, 80 Cal. Rptr. 354, 458 P. 2d 194, certiorari denied, 397 U.S. 915, and calls for a medical judgment well within the professional competence of physicians to make.

#### I. THE COURT HAS JURISDICTION OVER THIS APPEAL

In order to determine whether this Court has jurisdiction over this case under the Criminal Appeals Act, two questions must be answered: First, is the District Court for the District of Columbia one of the "district courts" referred to in the Act? and, second, is the abortion statute in question, passed by Congress and approved by the President, a "statute" within the meaning of the Act? If, as we urge, both questions must be answered in the affirmative, the further questions are



presented as to whether the government could, nevertheless, have appealed to the Court of Appeals for the District of Columbia Circuit pursuant to 23 D.C. Code 105 and, if so, whether this Court, accordingly, should abstain from exercising jurisdiction under the Criminal Appeals Act.

## A

Until 1907, the United States had no right of appeal in criminal cases tried in federal courts outside of the District of Columbia. See *United States v. Sanges*, 144 U.S. 310. To remedy this situation, a bill was introduced in the House of Representatives in 1906 adopting the language of Section 935 (the predecessor of 23 D.C. Code 105) of the District of Columbia Code of 1901, which had given the government "the same right of [appeal] that is given to the defendant." See H. Conf. Rep. No. 8113, 59th Cong., 2d Sess. The proposed legislation was designed to extend the "provision of the code of the District of Columbia to all districts in the United States," H. Rep. No. 2119, 59th Cong., 1st Sess. 2. The final Criminal Appeals Act which emerged as law in 1907 rejected the District provision in favor of language restricting the government's right of appeal to narrowly defined instances and providing for a direct appeal to this Court from decisions of "district or circuit courts."<sup>4,5</sup>

In 1933, this Court held that the term "district

<sup>4</sup> For a discussion of the legislative history of the Criminal Appeals Act, see *United States v. Sisson*, No. 305, O.T., 1969, decided June 29, 1970, slip op. at 24-27; *Carroll v. United States*, 354 U.S. 394, 402, n. 11.



court", as used in the Criminal Appeals Act, did not encompass the Supreme Court of the District of Columbia (the trial court of the District) notwithstanding a section in the District of Columbia Code providing that the Supreme Court of the District "shall possess the same powers and exercise the same jurisdiction as the district courts of the United States." *United States v. Burroughs*, 289 U.S. 159, 163. When the Criminal Appeals Act was amended in 1942 to provide for appeals to the circuit courts of appeals, specific reference was made to, and the same jurisdiction conferred upon, the "United States Court of Appeals for the District of Columbia." 56 Stat. 271. In the same statute, Congress included a separate provision giving the United States Court of Appeals for the District of Columbia power to review judgments of the (by then created) District Court of the United States for the District of Columbia in criminal cases on appeals taken by the United States "in cases where such appeals are permitted by law." 56 Stat. 272.\*

The legislative history of the 1942 amendment casts no light upon—indeed includes no discussion of—this aspect of the law which for the first time brought the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia within the Criminal Appeals Act. Similarly there is no mention of any *limitation* on the jurisdiction conferred upon this Court when

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\* Specific reference in the Criminal Appeals Act to the United States Court of Appeals for the District of Columbia was eliminated by an amendment in 1949, 63 Stat. 97, which altered the language of the statute to conform to the changed nomenclature of the courts (*i.e.*, "courts of appeals" for "circuit courts." 62 Stat. 991; see also 63 Stat. 107, now 28 U.S.C. 451).

the appeal is from the dismissal of an indictment based upon the invalidity or construction of a local District of Columbia statute. On the contrary, it seems to have been assumed that the United States courts for the District of Columbia were not distinguishable from the other United States district and appellate courts insofar as appeals by the United States in criminal cases are concerned. See H. Rep. No. 45 and S. Rep. No. 868, 77th Cong., 1st Sess.; H. Conf. Rep. No. 2052, 77th Cong., 2d Sess. Indeed, it is now well settled that, since the 1942 amendments, the Criminal Appeals Act applies to decisions of the United States District Court of the District of Columbia. *United States v. Hoffman*, 161 F. 2d 881, 882-883 (C.A.D.C.), jurisdiction upheld on certification to this Court and decided on the merits, 335 U.S. 77. See also *Carroll v. United States*, 354 U.S. 394, 411; *United States v. Bramblett*, 348 U.S. 503; *United States v. Waters*, 175 F. 2d 340 (C.A.D.C.).

### B

Given that the District Court for the District of Columbia is one of the "district courts" covered by the Criminal Appeals Act, we turn to the second question—whether a judgment holding unconstitutional a statute applicable only to the District of Columbia is a "decision \* \* \* based upon the invalidity or construction of the statute upon which the indictment \* \* \* is founded" within the purview of the Act, in which case the Act provides for a direct appeal to this Court. If, on the other hand, statutes applicable only to the District of Columbia do not fall within the quoted language, an appeal in this case to the Court of

Appeals for the District of Columbia circuit is authorized under the third and fourth quoted paragraphs of Section 3731, set forth on pp. 2-3, *supra*.

The literal language of Section 3731 clearly includes statutes limited in operation to the District of Columbia. In *United States v. Waters*, 175 F. 2d 340, appeal dismissed on motion of the United States, 335 U.S. 869, the Court of Appeals for the District of Columbia certified a case involving the validity of a local District statute to this Court for direct review under Section 3731, although the possibility that the direct review provisions of Section 3731 might not be applicable was not averted to.

While this Court has not dealt directly with the applicability of the Criminal Appeals Act to statutes of local application only, it has ruled that a constitutional challenge to an act of Congress applicable only to the District of Columbia must be heard by a three-judge court under 28 U.S.C. 2282, which provides that an action to enjoin the operation of an "Act of Congress" must be considered by such a court. *Shapiro v. Thompson*, 394 U.S. 618, 625, n. 4. Before that decision there had been some doubt as to whether this was a necessary construction of Section 2282. In *Ex parte Cogdell*, 342 U.S. 163, this Court had raised a question as to whether the three-judge statute governed where the act under attack applied only in the District of Columbia. Presumably, it was thought that the situation might be analogous to decisions under 28 U.S.C. 2281, holding that local ordinances and the like were not "statutes" of a state so as to require a three-judge court when constitutionality was challenged in an action to enjoin enforcement of the provisions. See

*Moody v. Flowers*, 387 U.S. 97, 101, and earlier decisions there cited.' In *Shapiro v. Thompson*, however, the Court resolved the issue saying (394 U.S. at p. 625, n. 4) :

Section 2282 requires a three-judge court to hear a challenge to the constitutionality of "any Act of Congress." (Emphasis supplied.) We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia.\*

There is no more basis for reading an exception into the Criminal Appeals Act, which is, by its terms applicable to "all criminal cases"—not just to those arising under a statute of general applicability. Indeed, the term "statute" used here is arguably more broadly inclusive than "Act of Congress." At all events, many criminal statutes of the United States have only limited territorial applications. See *e.g.*, 18

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\* In construing its jurisdiction under 28 U.S.C. 1254(2), 1257(1) and 1257(2), which allow appeals from decisions involving the constitutionality of "State statute[s]", "statute[s] of the United States" and "statute[s] of any state," respectively, this Court has consistently given those terms broad scope. See Stern & Gressman, *Supreme Court Practice*, pp. 31-34, 80-87 (4th ed. 1969).

\* In *Berman v. Parker*, 348 U.S. 26, the Court had considered the constitutionality of a District of Columbia statute in an appeal under 28 U.S.C. 1253 from a decision of a three-judge court.

\* Thus, the Criminal Appeals Act might authorize direct appeal to this Court of a judgment dismissing a criminal case for invalidity of a statute enacted by a local legislature if the prosecution were instituted by the United States in a United States district court. That procedure was not appropriate in *District of Columbia v. Thompson Co.*, 346 U.S. 100, because the prosecution in that case was initiated by the District government itself in its own municipal court.

U.S.C. 1111 and 1112, punishing homicide "[w]ithin the special maritime and territorial jurisdiction of the United States" and 18 U.S.C. 1151-1160, dealing with Indian territory. So long as Congress legislates for the District of Columbia and prosecutions under the D.C. Code are brought by the United States in the District Court of the United States for the District of Columbia, we see no basis on which a decision of the district court dismissing an indictment predicated on the construction or invalidity of what is undoubtedly a "statute", duly enacted by both Houses of the federal Congress, and signed by the President, can be deemed outside the scope of the Criminal Appeals Act.<sup>10</sup>

*C*

Assuming, as we believe we have established, that the Criminal Appeals Act authorizes a direct appeal in this case to this Court, the possibility that the Court of Appeals for the District of Columbia Circuit has concurrent jurisdiction pursuant to 23 D.C. Code 105 must be analyzed. That provision, which was adopted as part of the D.C. Code of 1901 some six years prior to the adoption of the Criminal Appeals Act, gives the gov-

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<sup>10</sup> An analogous situation has been considered by the High Court of Australia. Similar to Congress, the Australian Parliament has, in addition to its authority to pass laws of a general nature affecting the entire Commonwealth of Australia, specific authority to pass laws applicable in individual territories not included in the Australian States. In *Lamshed v. Lake*, 99 C.L.R. 132, 138-148 (Dixon, C.J.), the High Court made it clear that a law passed by Parliament pursuant to its power to legislate for individual territories was a "law of the Commonwealth" entitled to the same respect as laws passed pursuant to Parliament's general legislative powers.

ernment, subject to an exception not here relevant, "in all criminal prosecutions \* \* \* the same right of appeal that is given to the defendant." Act of March 3, 1901, c. 854, 31 Stat. 1189, 1341, Section 935.<sup>11</sup>

As we have already noted, *supra*, pp. 11-12 this Court determined in 1933 that the Criminal Appeals Act as originally enacted did not apply to appeals from the courts in the District of Columbia as those courts were not "district courts" within the meaning of the Act, *United States v. Burroughs*, 289 U.S. 159. Instead, such appeals continued to be governed solely by the predecessor of 23 D.C. Code 105 (289 U.S. at 162). See also *United States v. Sweet*, No. 577, O.T., 1969, decided June 29, 1970. With the amendment of the Criminal Appeals Act in 1942 to include appeals from the District Court of the District of Columbia, however, see pp. 12-13, *supra*, the Act and the District appeals provision overlapped.

This overlap was not discussed by either the court of appeals or this Court in *United States v. Hoffman*, 161 F. 2d 881, jurisdiction upheld on certification to this Court and decided on the merits, 335 U.S. 77, a case involving the construction and validity of the Emergency Price Control Act of 1942. The relationship between the two appeals statutes was, however, the subject of a lengthy discussion in *Carroll v. United*

<sup>11</sup> Other than a very general statement in the House Report on the D.C. Code of 1901 that many provisions of the Code were drawn from the laws of other States, H. Rep. No. 1017, 56th Cong., 1st Sess., the legislative history of the District appeals statute contains no indication as to why the government was given the right of appeal. Presumably, as this Court has noted, the draftsmen of the Code were influenced by the fact that similar provisions were in effect in many other States. See *Carroll v. United States*, 354 U.S. 394, 410.

*States*, 354 U.S. 394, where the Court concluded that (354 U.S. at 411)—

appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U.S.C. § 3731, although as to cases of the type covered by that special jurisdictional statute, its explicit directions will prevail over the general terms of [23 D.C. Code 105] [citing *Hoffman*].

This statement seemed to settle the matter for situations with respect to which the two statutes overlapped: the Criminal Appeals Act would control. And we would stop here if it were not for the Court's recent ruling in *Sweet*, *supra*.

Whether the *Carroll* rationale applies where the underlying statute operates only in the District of Columbia has been placed in some doubt by the *Sweet* decision. In *Sweet*, the government had appealed to the court of appeals under 23 D.C. Code 105 from the dismissal of an indictment charging Sweet with various crimes under the D.C. Code. Believing that a direct appeal to this Court under the Criminal Appeals Act was appropriate, the court of appeals certified the case to this Court. In finding certification unauthorized, the Court noted that the court of appeals had made no determination that it lacked jurisdiction to hear the government's appeal. This observation in *Sweet* would seem to suggest, at the least, that the Criminal Appeals Act and the District appeals provision may offer the government the choice of alternative appellate forums in cases involving the validity of statutes of local applicability only. If this Court should now elaborate upon the apparent suggestion in *Sweet* and hold that, indeed, the government could have taken this appeal to the court of



appeals in the first instance, the final question arises as to whether the Court can or should decline to exercise its Criminal Appeals Act jurisdiction.

There are understandably appealing arguments for the proposition that appeals involving the validity of acts of Congress applicable only in the District of Columbia should be taken in the first instance to the Court of Appeals for the District of Columbia Circuit and that accordingly any such appeals brought directly to this Court under the Criminal Appeals Act should be dismissed. Recognizing that statutes or rules which are of only local effect ordinarily do not give rise to issues of national policy, this Court has on occasion deferred to decisions of the court of appeals based on interpretations of local District statutes or rules of law. See *Griffin v. United States*, 336 U.S. 704, 712-718, *District of Columbia v. Pace*, 320 U.S. 698, 702, *Del Vecchio v. Bowers*, 296 U.S. 280, 285. This deferment policy has yielded, however, both where statutory interpretation questions are "so enmeshed with constitutional issues that complete disposition by this Court is in order," *District of Columbia v. Little*, 339 U.S. 1, 4, n. 1; *Kent v. United States*, 383 U.S. 541, 557, n. 27; and where "application of the District Code has an impact not confined to the Potomac's shores, but reaching far beyond." *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 556. See also, Stern & Gressman, *Supreme Court Practice*, pp. 185-189 (4th ed. 1969). In *General Motors*, the Court was primarily concerned that the interpretation given by the court of appeals to the District provision apportioning taxes on interstate businesses would create substantial dangers of multiple taxation;



accordingly, this Court interpreted the statute to avoid such dangers. While none of the above cases involved direct appeals to this Court, they do point out the instances where consideration in this forum of issues raised by local statutes may be appropriate.<sup>12</sup>

A decision finding the District abortion statute unconstitutionally vague is, we submit, not merely of local significance. It involves a general question of constitutional law, applicable throughout the United States. The significance of the decision in this case is not "confined to the Potomac's shores", but will lay down a rule for the Nation, with immediate applicability to many other States, where similar abortion provisions are under attack.

Beyond these policy considerations, however, we contend that the procedural statutes as written do not leave this Court discretion to decline to exercise the jurisdiction conferred upon it by the Criminal Appeals Act, even should it be decided that the appeal could have been taken to the court of appeals in the first instance under 23 D.C. Code 105. A review of the history of the appellate jurisdiction of this Court, see Hart and Wechsler, *The Federal Courts and the Federal System*, pp. 1313-1321 (1953), discloses that only in the limited sense of rejecting cases obviously without merit or involving no substantial federal question, has this Court construed its duty to review cases within its obligatory jurisdiction as "discretionary."

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<sup>12</sup> Cf. *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, where this Court granted certiorari to construe an Alaskan statute which, because of the inducement of the Social Security Act of 1935, had provisions similar to those in statutes of 43 States and territories.

Well before the Judiciary Act of February 13, 1925, 43 Stat. 936, eased the burden on this Court's docket by restricting the obligatory jurisdiction of the Court while proportionally expanding the classes of cases within its discretionary power of review, the Court developed the practice of dismissing appeals from state courts where no substantial federal questions were presented. See, *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311; *Zucht v. King*, 260 U.S. 174, 176. This technique, now embodied in Rule 15 (1) (e) and (f) and applied, as well, to appeals from federal courts which are obviously without merit (where summary affirmance rather than dismissal is appropriate), is currently used to dispose of well over one-half of the appeals brought to this Court. See Stern & Gressman, *supra*, p. 194. This limited "discretion" to handle appeals summarily, however, does not lend support to the proposition that the Court can refuse to exercise jurisdiction duly conferred upon it by Congress.<sup>13</sup> To the contrary, Mr. Justice Douglas, in his dissent in *Linehan v. Waterfront Commission*, 347 U.S. 439, has warned against expanding the summary practice so as to dilute the "right" of appeal that "Congress carved out" in certain specified cases. See also, Mr. Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A. 541, 546 (1958).

<sup>13</sup> Different considerations, not applicable to appeals cases, have led this Court to decline to exercise jurisdiction over cases admittedly within its original jurisdiction where other more appropriate forums are available. See *Massachusetts v. Missouri*, 301 U.S. 1, 19-20; *Louisiana v. Cummins*, 314 U.S. 580; *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 464-465, and dissent 469-470. Similar considerations led to the denial of the government's motion for leave to file complaints in *United States v. Alabama*, 382 U.S. 897.

Nothing in the Criminal Appeals Act or its legislative history, suggests that Congress intended the Act to be construed—wholly inconsistently with the construction given other appeals statutes—to confer upon this Court the discretionary power to decline to exercise jurisdiction. Indeed, the wording of the Act—“[a]n appeal *may* be taken by and on behalf of the United States \* \* \*” (emphasis added)—suggests that the choice of forum, if any, lies with the United States. Finally, the transfer provision of the Act seems no more available here than it was in *Sweet, supra*; it operates only when, *according to the statute*, the appeal should have been taken to the other court *under the Act*. That is not the present situation. We therefore conclude that the Court should exercise its jurisdiction over this appeal.

## II. THE DISTRICT COURT ERRED IN HOLDING THE ABORTION STATUTE UNCONSTITUTIONALLY VAGUE ON ITS FACE

*A. Only the vagueness issue is properly before the Court on this appeal*

In moving to dismiss the indictments, appellee relied primarily on the alleged unconstitutional vagueness of the abortion statute. Although other constitutional challenges were presented to the court by an *amicus curiae*,<sup>14</sup> the district court's decision was based

<sup>14</sup> The American Civil Liberties Union Fund was permitted to file a brief as *amicus curiae*, in support of defendants' motions to dismiss (D.C. D.C. Nos. 1587-69, 1044-68). In that brief, in addition to urging the vagueness point, the A.C.L.U. argued that (1) the “challenged statute is an arbitrary invasion of the fundamental right of a woman to determine when to bear offspring,” (2) the “statute is an arbitrary invasion of the right of the physician to prescribe for his patient in accordance with his best pro-

solely upon the vagueness issue. In these circumstances, it would be inappropriate for the Court to extend its inquiry to consider the additional challenges. *United States v. Automobile Workers*, 352 U.S. 567, 589-590. This is particularly true where, as here, many of those issues—such as the asserted infringements by the abortion statute of the “fundamental right” of women not to bear children—would necessitate consideration of largely unexplored and difficult constitutional questions on a record barren of facts.

In the *Automobile Workers* case, the district court had dismissed an indictment against certain union officials (for alleged unlawful expenditures of union funds in connection with a congressional campaign) on the grounds that the indictment did not state an offense. On direct appeal under the Criminal Appeals Act, this Court held that the indictment did charge an offense, but declined to reach numerous other constitutional attacks on the statute proffered by the union officials. In passages equally applicable to the instant case, the Court stated (352 U.S. at 590, 591-592):

The impressive lesson of history confirms the wisdom of the repeated enunciation, the variously expressed admonition, of self-imposed inhibition against passing on the validity of an

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fessional knowledge,” (3) “[t]here is no compelling state interest sufficiently strong to justify the prohibition of abortion by a licensed physician on a woman who desires the abortion,” (4) the “statute violates the due process clause of the Fifth Amendment \* \* \* on its face and in its application,” and (5) the “statute is based upon religious theory and thus is a law respecting an establishment of religion and in violation of the Constitution.”

Act of Congress "unless absolutely necessary to a decision of the case."

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Refusal to anticipate constitutional questions is peculiarly appropriate in the circumstances of this case. First of all, these questions come to us unilluminated by the consideration of a single judge—we are asked to decide them in the first instance. Again, only an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision. Finally, by remanding the case for trial it may well be that the Court will not be called upon to pass on the questions now raised. Compare *United States v. Petrillo*, 332 U.S. 1, 9 *et seq.*, with the subsequent adjudication on the merits in *United States v. Petrillo*, 75 F. Supp. 176.

Similar restraint was exercised in *United States v. Spector*, 343 U.S. 169, 172, and *United States v. Petrillo*, 332 U.S. 1, 9–11, both on direct appeal under the Criminal Appeals Act, where this Court reversed district court holdings that congressional statutes were unconstitutionally vague, but refused to consider other constitutional questions.

The Criminal Appeals Act itself, 18 U.S.C. 3731, imposes barriers to the consideration of divergent constitutional issues on direct review. As stated in *United States v. Borden Co.*, 308 U.S. 188, 193:

When the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond

the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the entire case.

*Borden* was cited with approval when this Court in *Petrillo* (332 U.S. at 5) refused to reach issues concerning the appropriate construction to be given an indictment (issues which would not have been directly appealable by the government to this Court). Similar questions exist as to whether this Court has jurisdiction under 18 U.S.C. 3731 to consider constitutional questions which might have been subject to direct review but were not passed on by the district court. See *United States v. Blue*, 384 U.S. 251, 256; Stern and Gressman, *Supreme Court Practice*, 41-42 (4th ed. 1969); Friedenthal, *Government Appeals in Federal Criminal Cases*, 12 Stan. L. Rev. 71, 97-100 (1959). In this case, the district court decided only the vagueness issue. If the government should prevail on that issue, the cause should be remanded to the lower court for such consideration of the other constitutional attacks on the indictment as may be appropriate. Should the district court sustain the indictment against such attacks or at least defer its decision thereon until after a trial, any appeal by appellee would lie with the court of appeals, which court would then have the benefit of a fully developed record. Even if the district court should immediately decide the broader constitutional issues against the government,

this Court would at least have had the benefit of a full analysis of the issues by the district judge.<sup>15</sup>

*B. The district court's ruling that the abortion statute is vague, which was rendered prior to the development of a factual context, was premature and erroneously accorded standing to appellee to challenge the statute on its face*

Before examining the district court's reasoning in finding the abortion statute unconstitutionally vague, we urge that the district court was in error in invalidating *on its face* that portion of the District of Columbia statute fixing standards for the performing of abortions by physicians. The court's ruling in effect accorded to appellee a degree of "standing" which this Court has found to be warranted only in the context of certain First Amendment cases, where the departure from the normal rule of testing the validity of statutes as applied is deemed justified by the need to curtail the "chilling effect" of such a statute on the rights of free expression of third parties. See, *e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 486-489; *Thornhill v. Alabama*, 310 U.S. 88, 96-98; see also Jurisdictional Statement in *United States v. 37 Photographs*, No. 1475 O.T., 1969, pp. 9-11. Where, as here, First Amendment rights of expression are not at stake,<sup>16</sup> there is no

<sup>15</sup> The situation in this case is to be distinguished from one where an appellee seeks to invoke, in support of the conclusion reached by the district court, a constitutional ground (which also would be available to the government on direct appeal) fully considered but rejected by the court below. See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 330.

<sup>16</sup> It might be argued that the mere existence of the allegedly vague abortion statute deters doctors from performing abortions where therapeutically necessary and that such deterrence brings the case within the "chilling effect" doctrine, particularly where



justification for deviating from this Court's sound principle that a statute should not be declared vague "on its face" where there exists a substantial class of situations to which the statute may validly be applied. *United States v. National Dairy Corp.*, 372 U.S. 29, 36; *United States v. Raines*, 362 U.S. 17, 21; *United States v. Petrillo*, 332 U.S. 1, 7; *United States v. Wurzbach*, 280 U.S. 396; see also, Amsterdam, Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 100-104 (1960); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599, 617-620 (1962). As said in the *National Dairy Corp.* case (372 U.S. at 32-33):

Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *United States v. Harriss*, 347 U.S. 612, 617 (1954). In deter-

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constitutional rights of women may be involved. Indeed, in finding that the statute failed to give physicians sufficient guidelines to determine whether a given abortion would be proscribed by the statute, the district court found the "ambiguities" particularly subject to criticism in view of the statute's impact on "significant constitutional rights of individuals" (App. 8). We submit, however, that there is no evidence in this case that the District of Columbia abortion statute deterred doctors from performing therapeutically necessary abortions. The present case is thus quite dissimilar from *Dombrowski* where the record clearly established that the statute there in question was being deliberately utilized by state officials to interfere with First Amendment rights. Finally, a voiding of the abortion statute to vindicate the constitutional rights of women obviously cannot be justified until the existence and limitations of such rights have been fully adjudicated. The constitutional claims to those rights, as we have argued, *supra*, pp. 22-26, are not in issue on this appeal.



mining the sufficiency of the notice a statute must of necessity be examined *in the light of the conduct with which a defendant is charged*. [Emphasis supplied.]

In declaring the District of Columbia abortion statute unconstitutionally vague prior to the development of a factual framework (whether by evidence at trial, a bill of particulars or stipulation of facts<sup>17</sup>), the district court departed from the sound teachings of these authorities. The present record does not indicate, for example, whether this case raises the problems—deemed critical by the district court—which relate to situations in which a licensed physician purports to exercise medical judgment as to whether an abortion should be performed. The district court was concerned that the statute provided the physician with no guidelines to exercise that judgment, permitting a lay jury to second guess him in a later criminal prosecution (App. 7-8).

The court's concern was plainly premature. It is evident that there may be many cases in which no such question comes to the surface because the defendant, although a licensed physician, does not exercise medical judgment.<sup>18</sup> If a physician, for example, performs an abortion on a woman whom he has never seen before and whom he has not examined beyond establishing the fact of pregnancy, he clearly would not be

<sup>17</sup> See *United States v. Halseth*, 342 U.S. 277.

<sup>18</sup> The very absence of decisions interpreting the instant statute, notwithstanding the "many prosecutions" thereunder noted by the district court (App. 5), suggests that most prosecutions were based on situations where no close questions of medical judgment were presented.

exercising the medical judgment required by the statute to determine whether the abortion was "necessary for the preservation of the mother's life or health."<sup>19</sup> His "hard-core" conduct would obviously be prohibited under any construction of the statute, see *Domkowski v. Pfister*, 380 U.S. 479, 491-492, and he accordingly could not validly claim that the statute, as applied to him, did not give him fair warning that such conduct was proscribed.

Since, in the absence of any evidence, there was nothing to indicate that the defendant exercised any medical judgment, the district court's decision was premature. Accordingly, we submit that the decision below should be vacated and the case remanded for reinstatement of the indictments.<sup>20</sup>

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<sup>19</sup> Leaving aside, of course, the case of a specialist who performs an abortion relying upon the representation of the patient's doctor that the operation is therapeutically justified.

<sup>20</sup> Such a course would not necessarily have the effect of merely postponing this Court's consideration of the merits of the vagueness ruling, even assuming that the district court were to re-issue its opinion verbatim following the development of facts which it deemed sufficient to give standing to appellee to raise a valid vagueness attack. Thus, if the district court were to grant appellee's motion to dismiss at the conclusion of the government's case, there would be no right to appeal under 18 U.S.C. 3731. See *United States v. Sisson*, No. 305, O.T., 1969, slip op. pp. 37-38, decided June 29, 1970. In any event, this course is warranted by the strong possibility that a remand would obviate the need for the federal courts to pass upon the questions now. See *United States v. Automobile Workers*, 352 U.S. 567, 591-592, quoted *infra*, pp. 23-24; *United States v. National Dairy Corp.*, 372 U.S. 29.

*C. The District of Columbia abortion statute is not unconstitutionally vague*

If this Court rejects our contention that appellee cannot appropriately attack the abortion statute on its face, it is necessary to reach the merits of the district court's holding that the statute is unconstitutionally vague.

1. *This Court should follow its longstanding policy of interpreting acts of Congress so as to avoid, where feasible, constitutional attacks thereon.*—Except for a very few cases dealing with statutes outlawing certain agreements and associations in restraint of trade,<sup>21</sup> we are unaware of any holdings of this Court voiding a federal statute for vagueness.<sup>22</sup> The situation is, of course, different with respect to state statutes. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479; *Winters v. New*

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<sup>21</sup> See, e.g., *United States v. L. Cohen Grocery Co.*, 255 U.S. 81.

<sup>22</sup> For cases rejecting attacks on federal statutes for vagueness, see, e.g., *Rowan v. Post Office Dept.*, No. 399, O.T., 1969, decided May 4, 1970; *Roth v. United States*, 354 U.S. 476; *United States v. Korpan*, 354 U.S. 271; *United States v. Harriß*, 347 U.S. 612; *United States v. Kahriger*, 345 U.S. 22; *United States v. Spector*, 343 U.S. 169; *Dennis v. United States*, 341 U.S. 494; *Jordan v. De George*, 341 U.S. 223; *American Communications Ass'n v. Douds*, 339 U.S. 382; *United States v. Petrillo*, 332 U.S. 1; *Screws v. United States*, 325 U.S. 91; *United States v. Ragen*, 314 U.S. 513; *United States v. Darby*, 312 U.S. 100; *Gorin v. United States*, 312 U.S. 19; *Shields v. Utah I. Cent. R.R.*, 305 U.S. 177; *Kay v. United States*, 303 U.S. 1; *United States v. Wurzbach*, 280 U.S. 396; *United States v. Alford*, 274 U.S. 264; *Baltimore & O. R.R. v. Groeger*, 286 U.S. 521; *Mahler v. Eby*, 264 U.S. 32; *Nash v. United States*, 229 U.S. 373; *Ex Parte Webb*, 225 U.S. 663. Compare *United States v. Evans*, 333 U.S. 483 and *United States v. Cardiff*, 344 U.S. 174, where this Court urged Congress to remedy the ambiguities in the statutes there involved. For a thorough

*York*, 333 U.S. 507; *Lanzetta v. New Jersey*, 306 U.S. 451. At least a partial explanation for this apparent discrepancy lies in this Court's role with respect to federal statutes as the final arbiter not only as to constitutionality, but as to their scope and meaning as well.<sup>23</sup> When faced with a constitutional attack on a federal statute, this Court is not confronted with a fixed interpretative decision of some state court, but is at liberty to examine and construe the statute so as to avoid alleged constitutional infirmities. *United States v. Harriss*, 347 U.S. 612, 618; *Schneider v. Smith*, 390 U.S. 17, 24-27. On occasion, in fact, the Court has gone to great lengths to provide a workable constitutional definition to rather broad or uncertain statutory language. *Roth v. United States*, 354 U.S. 476; *United States v. Harriss*, *supra*; *United States v. CIO*, 335 U.S. 106; *Screws v. United States*, 325 U.S. 91. Cf. *Welsh v. United States*, No. 76, O.T., 1969, decided June 15, 1970.

The fact that the statute involved in this case applies only to the District of Columbia, does not deprive this Court of its interpretative powers. While,

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examination of this Court's role in construing allegedly vague federal statutes, see Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. L. Rev. 67, 69-71, 81-85 (1960).

<sup>23</sup> Mr. Justice Jackson articulated a related consideration in his opinion in *United States v. Five Gambling Devices*, 346 U.S. 441, 449: "This Court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power."

as we have noted, see *infra*, pp. 19-20, this Court has on occasion deferred to decisions of the District of Columbia Court of Appeals interpreting local District statutes or rules of law, it has found it inappropriate to give such deference in cases where, as here, statutory interpretation questions are intertwined with constitutional issues. *District of Columbia v. Little*, 339 U.S. 1, 4, n. 1.

As we shall show, the District of Columbia abortion statute can reasonably be interpreted to meet appellee's attack on it for vagueness.

2. *The statute should be interpreted to allow a defense of good faith on the part of the physician performing the allegedly illegal abortion.*—The district court found that the abortion statute, 22 D.C. Code 201, did not protect from criminal penalty a licensed physician who asserted as a defense that he was proceeding in good faith and in the exercise of his professional judgment in performing the abortion. This conclusion followed from the court's reading of two decisions of the Court of Appeals of the District of Columbia—*Williams v. United States*, 138 F. 2d 81 and *Peckham v. United States*, 210 F. 2d 693, 697—as shifting, once the government had established the fact of abortion, the burden of proof to the physician to justify his acts. This shift resulted in the physician being "presumed guilty \* \* \* unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health" (App. 7). In the court's view, the "jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word 'health' should not determine whether he

stands convicted of a felony," as his "professional judgment made in good faith should not be challenged" (App. 7).

In our view, the district court misread *Williams*. In that case, the Court of Appeals for the District of Columbia Circuit held that since there was a "manifest disparity in convenience of proof and opportunity for knowledge" as between the defendant and the government, the burden of introducing proof of justification of an abortion could constitutionally be shifted to the person who performed it; furthermore, the intent of Congress under the statutory exception was to "furnish the defendants an opportunity for justification," not to make lack of justification "part of the description of the offense itself." 138 F. 2d at 82-83. There is no indication in the *Williams* opinion that the burden of *persuading* the jury that the abortion was justified is placed on the accused physician. To the contrary, the Court of Appeals noted that "[u]nder the District of Columbia Code a competent physician who acts in good faith *will always* be in a position to come forward with a justification for any operation which he undertakes to preserve the life or health of his patient", 138 F. 2d at 84 (emphasis added); to be acquitted, such evidence, with or without other evidence, need only be "sufficient to create a reasonable doubt of guilt." *Ibid.*<sup>24</sup>

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<sup>24</sup> *Williams* was cited with apparent approval by this Court in *United States v. Fleischman*, 339 U.S. 349, 362, n. 9, which applied *Morrison v. California*, 291 U.S. 82, to justify placing on a defendant charged with wilful failure to comply with a congressional subpoena the burden of submitting proof that she had made a good faith effort to have the subpoenaed records

Nor, as the court below felt (App. 7), does the holding in *Williams* raise the Fifth Amendment problems analyzed in *Leary v. United States*, 395 U.S. 6, and *United States v. Gainey*, 380 U.S. 63. Both these cases involved due process attacks on statutory presumptions where the proof of one fact gives rise to a presumption of the existence of a fact which is an element of the offense charged. The Court applied the controlling test of validity articulated in *Tot v. United States*, 319 U.S. 463, 467, that "there be a rational connection between the facts proved and the fact presumed." The district court's citation of those two cases is inapposite. By placing the burden of producing evidence relating to justification on the physician, no presumption of an ultimate fact is involved as *Williams* rightly held that lack of justification was not an element of the abortion offense.<sup>25</sup> Thus, as justification is an affirmative defense, no "rational connection" need be shown between the fact of abortion and the absence of justification.<sup>26</sup>

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produced. The Court made it clear that it was not discussing the burden of persuasion, which remained on the government throughout, but only the burden of going forward with some evidence directed toward raising an affirmative defense peculiarly within the defendant's knowledge. 339 U.S. at 360-364.

<sup>25</sup> This interpretation of the statute was followed by the government in this case as the indictments alleged only that abortions had been committed or attempted and made no mention of the absence of justification (App. 2-3).

<sup>26</sup> At least one state court has construed its similar abortion statute to require the defendant to introduce proof of justification, whereupon the burden of persuasion shifts to the government to show the lack thereof. *State v. Orsini*, 155 Conn. 367, 232 A. 2d 907. Similarly, the *A.L.I., Model Penal Code*, Tent. Draft No. 9 (1959), Section 207.11 (included with minor changes



In placing the burden of producing justification evidence on the physician, while acknowledging that a conscientious physician will always be able to raise a "reasonable doubt" as to his guilt by such introduction, *Williams* went a long way toward establishing good faith of the attending physician as a defense to the crime of abortion.<sup>27</sup> This Court should now take the final step towards establishing the good faith defense.

Other states with abortion laws which do not contain an explicit exception for a good faith attempt at compliance have read in such a defense. *Kudish v. Board of Registration in Medicine*, 248 N.E. 2d

as Section 230.3 of *A.L.I. Model Penal Code*, Proposed Official Draft (1962)) recommended that justification for abortion be made an affirmative defense with the burden of persuasion remaining on the government. *Id.* at page 156. To the contrary are *State v. Dunkleberger*, 206 Iowa 971, 221 N.W. 592, and *State v. Riley*, 256 A. 2d 273 (Del. Super. Ct.), which require the prosecution to negative the existence of any justifying circumstances in its direct case.

<sup>27</sup> A recent decision of the District of Columbia Court of Appeals recognizes in a related context the inviolability of a doctor's judgment that grounds are present to justify an abortion. In its opinions in *Doe v. General Hospital*, No. 24,011, decided March 20 and May 15, 1970, the court granted interim relief, in a proceeding brought to compel the District of Columbia General Hospital to grant abortions to all women who desire them, by ordering the hospital to perform therapeutic abortions on the basis of an area mental health clinic psychiatrist's recommendation that mental health grounds were present. The earlier of the two decisions (slip op. 2-3) made it clear that the judgment of the psychiatrist was not subject to re-evaluation by a private consultant to the District of Columbia Department of Health.



264, 266 (Mass.);<sup>22</sup> *State v. Dunkleberger*, 206 Iowa 971, 221 N.W. 592; contra, *Adams v. State*, 200 Md. 133, 88 A. 2d 556. Furthermore, placing a similar construction on the District of Columbia abortion statute would be consistent with this Court's interpretation of comparable provisions of prior narcotics laws allowing a physician to dispense narcotics to addict-patients "in the course of his professional practice." In *Linder v. United States*, 268 U.S. 5, 14-22, and *Boyd v. United States*, 271 U.S. 104, 106-107, the Court held that a charge of violating the statute was subject to an absolute defense of good faith belief by the physician that the drugs were appropriate for treatment of the addict.

Once the District of Columbia abortion statute is interpreted to give rise to a defense of good faith, the vagueness attacks on the words of the statute can be seen in their proper context. While we show in the next section of this brief that the words "life or health" are not fatally imprecise, it is enough to say at this point that the availability of the good faith

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<sup>22</sup> The Massachusetts statute used the word "unlawfully" to describe the type of situations in which abortion is proscribed. The Court in *Kudish* stated that its cases had developed from this the doctrine that a "physician may lawfully perform an abortion if he acts in good faith and in an honest belief that it is necessary for the preservation of the life or health of the woman" (248 N.E. 2d at 266). The same result was reached under Oregon's quite different law. *State v. Elliott*, 234 Ore. 522, 383 P. 2d 382. The *A.L.I. Model Penal Code*, Proposed Official Draft, Section 230.3 (1962) also provides in effect that a "physician's honest belief in the existence of the justifying circumstances will exculpate." Commentary, Tent. Draft No. 9, p. 156. See also Louisell & Noonan, *Constitutional Balance in The Morality of Abortion*, p. 230 (ed. by Noonan, 1970).

defense gives the doctor considerable—and perhaps, as a practical matter,” complete—insulation from arbitrary findings of a trier of fact. For, once a doctor shows that he made a medical judgment that the mother’s health required an abortion, the government must establish, not merely that the judgment was wrong, but that the health grounds were so frivolous as to negative the doctor’s good faith.

3. The phrase “necessary for the preservation of the mother’s life or health” is not unconstitutionally vague.—The vice of vagueness lies in the failure of a “criminal statute \* \* \* to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.” *United States v. Harriss*, 347 U.S. 612, 617. The Constitution does not impose “impossible standards”, however, as all that is required is that statutory language “conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” *United States v. Petrillo*, 332 U.S. 1, 7–8. Applying these traditional standards, the phrase “necessary for the preservation of the mother’s life or health” of the District of Columbia abortion statute is not so indefinite as to support a holding of void-for-vagueness.

In analyzing that statutory phrase, the legislative

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<sup>22</sup> It is highly unlikely that the government would seek indictments in cases where the circumstances indicate that a bona fide pre-abortion examination was made by the doctor and arguable health grounds for the abortion existed.

history of 22 D.C. Code 201 is of little help.<sup>30</sup> Furthermore, interpretations of state abortion statutes are of limited usefulness; while many state statutes contain the "life" standard, few incorporate the "health" concept.<sup>31</sup> The absence of these two sources of guidance, however, is not fatal.

The district court was concerned by the fact that the statute did not indicate whether the word "health" included mental as well as physical well-being (App. 7). This, we submit, is unwarranted. As the recent

<sup>30</sup> The statute was enacted in substantially its present form in 1901 as Section 809 of the 1901 District of Columbia Code, 31 Stat. 1322. It was later amended in 1953 to increase the punishment but was substantively left unchanged. 67 Stat. 93. Prior to 1901 the existing statute proscribing abortion made an exception only "for the purpose of preserving the life of any woman pregnant, \* \* \* induction of premature labor having been previously recommended by at least one physician in counsel." Abert, *The Compiled Statutes in Force in the District of Columbia*, Ch. XVI, pp. 13-20 (1894). The legislative history of the 1901 Act contains no discussion of Section 809. The House Report (H. Rep. No. 1017, 56th Cong., 1st Sess.) merely discusses the origins of the Code. It was prepared by Judge Cox of the Supreme Court of the District of Columbia and approved by the D.C. Bar Association prior to its introduction in Congress. Judge Cox stated that in writing the Code he made reference to the laws of Maryland, Virginia, New York and Ohio (none of whose abortion statutes, however, included an exception to preserve the "health" of the mother). There was no Senate Report.

<sup>31</sup> For a collection of State abortion statutes as they existed in 1961, see Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 Geo. L.J. 395, 447-520 (App. I) (1961). Among the States which have enacted new abortion laws since 1961 are Colorado (Colo. Rev. Stat. 40-2-23) and North Carolina (Gen. Stat. 14-45.1), both of which adopted laws closely related to that of the District of Columbia in that they extend the conditions under which abortions may be performed to those involving a threat to the mother's "health" as well as her "life."

opinions of the District of Columbia Court of Appeals in *Doe v. General Hospital*, No. 24,011, decided March 20 and May 15, 1970, clearly indicate, the mental health of the mother is being and has been considered as a valid criterion for the performance of abortions within the District of Columbia. The district court's further concern that the medical profession could not ascertain the scope of the word "health" with the requisite definiteness is also unfounded.<sup>32</sup> Whether any surgical procedure is necessary to preserve the health of an individual is a judgment that physicians are called upon to make almost every time surgery is contemplated. Indeed, the majority opinion in *People v. Belous*, 80 Cal. Rptr. 354, 458, P. 2d 194, certiorari denied, 397 U.S. 915, which found the "life" standard of the pre-1967 California abortion statute unconstitutionally vague,<sup>33</sup> noted that the test currently in effect in California—authorizing abortions where there is a "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother" (Cal. Health and Safety Code Section 25951(c)(1))—"is a medical one \* \* \* and the assessment does not involve con-

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<sup>32</sup> It should be noted that expert medical judgments pursuant to standards no more certain than the standard here under attack must be made in other contexts. One example would be the medical judgments required under the various formulations of mental responsibility for crime. Cf. *Powell v. Texas*, 392 U.S. 514, 536-537.

<sup>33</sup> For a critical analysis of the *Belous* decision, see Louisell & Noonan, *supra* n. 28, at pp. 237-241.

siderations beyond medical competence." (458 P. 2d at 205).<sup>34</sup>

Finally, there is nothing defective about the phrase "necessary for the preservation of" in the District of Columbia statute. The uncertainty found in the similar California language by the *Belous* court stemmed from its association with the word "life" alone.<sup>35</sup> No such ambiguity is present when the more inclusive term "health" is added.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded with directions to reinstate the indictments against appellee.

ERWIN N. GRISWOLD,  
*Solicitor General.*

WILL WILSON,  
*Assistant Attorney General.*

SAMUEL HUNTINGTON,  
*Assistant to the Solicitor General.*

JEROME M. FEIT,  
ROGER A. PAULEY,  
*Attorneys.*

JULY 1970.

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<sup>34</sup> As the *Belous* case was only concerned with the constitutionality of the old California abortion statute, the majority specifically disclaimed passing on the adequacy of the new test adopted in 1967 (458 P. 2d at 206, n. 15).

<sup>35</sup> The *Belous* majority noted that the various dictionary definitions of the word "preserve" used in the California statute ranged "from the concept of maintaining the status quo—that is, the woman's condition of life at the time of the pregnancy—to maintaining the biological or medical definition of 'life'—that is, as opposed to the biological or medical definition of 'death'," 458 P. 2d at 198.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

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**No. 84**

**UNITED STATES,**

*Appellant,*

**v.**

**MILAN VUITCH, M.D.**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**BRIEF FOR HUMAN RIGHTS FOR WOMEN, INC.  
AS AMICUS CURIAE**

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**INTEREST OF HUMAN RIGHTS FOR WOMEN, INC.**

Human Rights for Women, Inc., is a non-profit tax exempt organization, which was incorporated in the District of Columbia in December, 1968. Its purposes are to provide volunteer legal assistance in litigation involving rights of women under the law, to undertake research on



issues relevant to discrimination against women, and to provide for educational projects on conditions concerning women.

The issues in this case are highly significant in defining the rights of women under the law, a matter of central concern to Human Rights for Women. HRW believes that laws which deny or severely limit the availability of abortion (1) fundamentally restrict women in their right to self-determination as human beings, (2) lead women to attempt self-inflicted abortions or to seek illegal abortions by non-medical personnel at grave risk to life and health, and (3) discriminate against women on the basis of sex by visiting "punishment" for intercourse not for procreative purposes only on women and not on their male partners.

Until the instant case, HRW has devoted its efforts to furnishing legal counsel to women in cases involving sex discrimination in employment. The denial of equal job opportunities to women continues to be a major concern of HRW. A primary cause of sex prejudice against women in employment is that women of child bearing age frequently do become pregnant regardless of their intentions and life plans, they do have children, and society—by law and custom—imposes "special responsibilities" on women in the actual rearing of their children. Restrictions on the right of a woman to terminate an unwanted pregnancy not only reduce her to a reproductive instrument of the State, but effectively limit her opportunities to work to earn a living and to contribute to the Nation's economy, its policies and decisions, on an equal footing with men. The fact that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, prohibits this kind of employment discrimination against women does not prevent it from happening.

In accordance with Rule 42(2) of the Rules of the Supreme Court, the Solicitor General in behalf of the United States and the attorneys for the Appellee, Dr. Vuitch, have given written consent to the filing of an *amicus curiae* brief by Human Rights for Women, Inc.

Human Rights for Women wishes to make clear two points in regard to its position on abortion: First, we do not want to be understood as anywhere intending to show opposition to, or denigration of, contraception. However, many thousands of women do not use birth control, either because they do not know of it, or because they do not have access to it. Many women cannot use the most effective means, The Pill, for a variety of medical reasons. Furthermore, even if every woman in America of child-bearing age were using The Pill, the 1% failure rate would still result in close to 230,000 unwanted pregnancies per year. Tietze, "Oral and Interuterine Contraception: Effectiveness and Safety," *International Journal of Fertility*, Oct.-Dec. 1968, P.379. Human Rights for Women does not advocate abortion as a substitute for contraception.

Secondly, we are not arguing only for the right of the most extreme hardship cases to be afforded abortion care. We are arguing for the right of *every* woman to safe, legal abortions, without humiliation and red tape. An eminent woman sociologist points out:

"It is the situation of *not wanting a child* that covers the main rather than the exceptional abortion situation. But this fact is seldom faced. I believe many people are unwilling to confront this fact because it goes counter to the expectation that women are nurturant, loving creatures who welcome every new possibility of adding a member of the human race. To come to grips with the central motivation that drives women to abortion, *that they do not want the child*, requires admitting that the traditional expectation is a gross oversimplification of the nature of women and the complex of values which determine their highly individuated response to the prospects of maternity." Rossi, "Abortion Laws and Their Victims," *Transaction*, Sept./Oct. 1966

We believe that any examination of the legal status of abortion in 1970 must be seen in this light.

## QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under the Criminal Appeals Act, 18 U.S.C. 3731, to entertain a direct appeal from a decision of the United States District Court for the District of Columbia dismissing an indictment on the ground of the invalidity of the statute on which the indictment is founded, where the statute applies only in the District of Columbia.

2. Whether the District of Columbia abortion statute, 22 D.C. Code 201, is unconstitutional.

## STATEMENT

Dr. Milan Vuitch, a licensed physician, was indicted for violating the District of Columbia abortion law, 22 D.C. Code 201, which prohibits a competent licensed physician from producing an abortion unless it is "necessary for the preservation of the mother's (sic) life or health." The District Court for the District of Columbia dismissed the indictment on the ground that the D.C. abortion law was unconstitutional as applied against physicians. 305 F. Supp, 1032, 1034. A direct appeal was taken to this Court under the Criminal Appeals Act, 18 U.S.C. 3731.

## ARGUMENT

### 1. THE COURT HAS JURISDICTION OVER THIS APPEAL.

The Criminal Appeals Act, 18 U.S.C. 3731 provides that "[a]n appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States \* \* \* [f]rom a decision or judgment setting aside, or dismissing any indictment \* \* \* where such decision or judgment is based upon the invalidity of the statute upon which the indictment or information is founded." The plain meaning of this statute is to allow the United States to take a direct appeal to this Court in any

criminal case where an indictment is dismissed on the grounds of unconstitutionality of the statute, whether the statute be federal and national in scope, or applicable only in certain federal territory, or applicable only in the District of Columbia, as in the instant case.

The question is whether a direct appeal lies in this case, since the statute held unconstitutional applies only in the District of Columbia rather than nation-wide. We think a direct appeal lies and we agree, in general, with the Government's analysis on this issue (Govt. br. pp 10-22). We would like to emphasize two points: (1) This Court has held that a direct appeal lies from a three-judge court decision pursuant to 28 U.S.C. 2282, 1253 where the Act of Congress applies only in the District of Columbia. *Shapiro v. Thompson*, 394 U.S. 618, 625, n. 4. The underlying purpose of allowing direct appeals in three-judge cases and in cases under the Criminal Appeals Act is the same—in both situations the enforcement of the law may be thwarted until a final ruling of the highest Court is had. (2) In *United States v. Sweet*, No. 577, O.T., 1969, decided June 29, 1970, (38 L. W. 3520), this Court remanded a case involving criminal statutes applicable only to the District of Columbia, to the Court of Appeals for the District of Columbia, pursuant to the remand provision of 18 U.S.C. 3731. That case differs from the instant case in that the Government did not appeal pursuant to the Criminal Appeals Act; it appealed to the Court of Appeals expressly pursuant to a local statute, 23 D.C. Code 105, and this Court has no jurisdiction to hear or to accept transfers of cases from the Court of Appeals appealed pursuant to that law.

**2. THE D.C. ABORTION LAW WHICH PROHIBITS A PHYSICIAN FROM PERFORMING AN ABORTION UNLESS IT IS "NECESSARY FOR THE PRESERVATION OF THE MOTHER'S LIFE OR HEALTH" IS UNCONSTITUTIONALLY VAGUE.**

The District of Columbia abortion law (22 D.C. Code 201) provides, in part:

"Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as *necessary for the preservation of the mother's (sic) life or health* and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; \* \* \*" (emphasis supplied)

The District Court found the phrase "necessary for the preservation of the mother's life or health" unconstitutional in that it "fails to give that certainty which due process of law considers essential in a criminal statute." 305 F. Supp. 1032, 1034.

The lack of clarity in a law of this type is quite fully spelled out in the decision of the California court in *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194, cert. denied, 397 U.S. 915. The Government claims that the inclusion of "health" as well as "life" makes the D.C. statute more clear than the law held unconstitutional in *Belous* (Govt br. 39-40). While the inclusion of "health" may make less important the vagueness of "life," the term itself is even more vague. The Government states that "health" includes both mental and physical health (Govt br. 38-9). Presumably, in all cases where the woman is unmarried, giving birth to an "illegitimate" child would cause some damage to her mental health. Would a physician violate the law if he believed an abortion necessary on the ground that an additional child in a family would unduly tax the mother's physical health by reason of the additional work in rearing

the child? Would he (or she) be violating the law if he produced an abortion where the additional expense of an additional child would so lower the family's economic level that the mother could not afford adequate nutritious food?

Since abortion during the first trimester of pregnancy is less hazardous to life and health for women than completion of a pregnancy, it could be argued that it is virtually always in the interest of the health of a woman to abort rather than continue a pregnancy.

The Government asks the Court to give the law a clearer and more definite meaning by interpreting it to mean that it provides the physician a complete defense of good faith. (Govt br. 10, 32-37) But even if the physician were given a complete defense of good faith, the Government contends that the law would be violated if the abortion were performed on a woman who was not previously known to the physician. (Govt br. 28-29) Could such a woman return to the doctor's office the following day or week for her abortion? Further, the Government states that it is "highly unlikely" that indictments would be sought where there had been a "bona fide pre-abortion examination" by the doctor and "arguable health grounds" existed for an abortion. (Govt br. 37, nt. 29). While all of this may make the D.C. law more clear to the Government, it is doubtful that physicians would know with any certainty what actions are and what actions are not a violation of the law. This is especially true where the Government itself is speculative about the enforcement policy. And what if the enforcement policy changes with changed Government personnel? Will the Government announce its intentions as to what it regards as prohibited to the doctors in advance? We submit that the Government's proposed definition of the law does not clarify it, but makes it even more vague and uncertain. Even if it were possible to give a clear meaning to the law so that due process rights of offending physicians would not be violated, such interpretation would still be unconstitutional because it ignores and violates fundamental rights of women.

**3. UNDER ANY READING OF THE STATUTE, THE PROHIBITION AGAINST ABORTIONS PERFORMED BY LICENSED PHYSICIANS VIOLATES FUNDAMENTAL CONSTITUTIONAL RIGHTS OF WOMEN.**

A. The D.C. abortion law invades the privacy and liberty of women in matters related to marriage, family and sex, the right of every individual to the possession and control of her own person, and the right simply to be left alone, as guaranteed by the First, Fourth, Fifth and Ninth Amendments. *Griswold v. Connecticut*, 381 U.S. 479. See also, *Loving v. Virginia*, 388 U.S. 1; *Skinner v. Oklahoma*, 316 U.S. 535. The Constitution protects the right to marry (*Loving*) or not to marry; the right to use (or not use) contraceptives (*Griswold*); and the right to have offspring (*Skinner*). At least as important is the right to determine when and how many (if any) offspring one will have.

When the state makes it a crime for a woman to have an abortion in the first trimester of pregnancy, by a licensed physician, in accordance with accepted and proven medical procedures, the state is engaged in a drastic, massive interference with the liberty and privacy of her life.

No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891)

Yet, the moment a woman conceives, the state steps in to determine what will and will not go on in her womb. For so great an interference, Government must show compelling justification under its police power to protect public health, welfare or morals. Whatever may have been such justifications at the time the abortion statute was enacted nearly 70 years ago, they do not obtain today. Advanced techniques in performing abortions simply and safely are in sharp contrast to the dangers to life and health in any type of surgery at the turn of the century. The dismal



prospects of over-population, and particularly the changed status of women in this country, also invalidate the old justifications.

Not only do abortion laws no longer serve their original purpose of protecting the life and health of the pregnant woman, but a large scale public health problem is *created* by abortion laws. These wide ranging health problems are well documented by the *amicus curiae* brief of 167 deans of medical schools and chairmen of departments of obstetrics and gynecology in support of Dr. Leon Belous in *People v. Belous*, 71 Cal.2d 996 (1969), cert. denied, 397 U.S. 915 (1970).

The(se) recorded facts bring one face-to-face with the hard, shocking almost brutal—reality that our statute designed in 1850 to protect women from serious risks to life and health has in modern times become a scourge.

Those who argue that women suffer terrible emotional trauma from abortion are almost exclusively male. A woman sociologist and expert on sociological aspects of abortion has written:

"... despite all claims to the contrary, there is no evidence that women who have had induced abortions are typically stricken with guilt and remorse as an aftermath." Rossi, "Abortion Laws and Their Victims," *Transaction*, Sept./Oct. 1966.

The undocumented wisdom gained by those who have guided many thousands of women through the safer channels of the underground reflect that women do indeed show one over-riding emotion after their abortions—relief.\*

Furthermore, the law in question perpetuates a gigantic underground of criminal abortions, constituting one of the largest rackets in the United States. Millions of dollars are

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\*For a description of tactics and procedures for getting around restrictive abortion laws, see Maginnis and Phelan, *The Abortion Handbook for Responsible Women*, Contact Books, North Hollywood, Calif., 1969.



made off the desperate women who endure its risks. See Task Force Report: Organized Crime (GPO 1967), p. 121.

There is a great out-cry among many that repeal of abortion laws will threaten the moral fibre of our country, as if women, as a class, had the discretion of alleycats.

It has been suggested that there is a state interest in preserving the morals of the state and controlling promiscuity. Besides the obvious fact that laws such as this have no effect whatsoever on sexual attitudes of the community, the Griswold case makes it clear that private sexual relations are beyond the purview of the state. The state has no compelling interest in controlling promiscuity. *People v. Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct. Orange Cty. Jan. 9, 1970)

It has been argued that the state has an interest in protecting the life of the unborn, thereby subordinating the interests of an adult woman to a fetus. The fetus is believed by some to be a person and by others to be a mere appendage to the woman. The question of when life begins is one which theologians, scientists, and legal scholars have debated for centuries. But to accept one conviction over another would be a law respecting an establishment of religion, in violation of the First Amendment.

We are invited to resolve the philosophical question . . . as to when an embryo becomes a child. For the purpose of this decision, we think it is sufficient to conclude that the mother's interests are superior to that of the unquickened embryo, whether the embryo is mere protoplasm, as the plaintiff contends, or a human being, as the Wisconsin statute contends. *Babbitz v. McCann*, 306 F. Supp. 400 (E.D. Wis.)

Summing up the status of the fetus in regard to abortion laws,

If there were life present at conception, abortions would not be permitted in cases of rape or incest,

or the other exceptions any more than it would be permitted to terminate the life of a one-year old whose life had come as the result of rape or incest. *People v. Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct. Orange Cty. Jan. 9, 1970)

The reasons for so great an invasion of privacy, as the District of Columbia abortion statute makes into the lives of women, no longer exist. When the interests involved are weighed, there is no substantial class of situations to which the statute may apply.

B. The statute denies women, as a class, the equal protection of the law guaranteed by the Fifth Amendment (*Bolling v. Sharpe*, 347 U.S. 497) in that it denies or limits them in their opportunity to pursue higher education, to earn a living, through gainful employment, and, in general, to decide their own future, as men are so permitted.

The moment a woman conceives, the state steps in to make a fundamental decision as to her future. She no longer has any say, in most cases, as to whether she will finish school, or work for a living so as to avoid welfare. The state can decide that all her life plans must be dissolved, and she must become the unwilling carrier of an unwanted fetus and the unwilling mother of an unwanted child. Between 3/4 and one million such unwanted births occur each year in the United States. (The Westoff Study, Planned Parenthood—World Population, "The Extent of Unwanted Fertility in the U.S.," 1969).

Any law which requires any individual other than the pregnant woman herself to decide if the woman shall have an abortion, makes that woman appear to be, if not specifically stating, so feeble minded, so incompetent, so immature and irresponsible, that she must have a guardian (the state) to tell her what she may or may not do for her own good. The powerlessness that attends the uncontrolled breeding of a woman reduces her to the status of a cow.

The effect of the abortion statute is to penalize women in areas of their lives which have nothing to do with their

childbearing role. An accident of biology—the fact that women conceive and men do not—is used as an excuse to discriminate against women in jobs, admission to schools, fellowships and research grants, and so on.

Forty-three percent of all women over the age of sixteen were in the labor force in 1969. Women account for 38% of all workers. (U.S. Dept. of Labor, Women's Bureau, "Background Facts on Women Workers in the United States," 1970). Women are the sole support of 11% of all American families and 61% of the Nation's poor children live in families headed by women (U.S. Dept. of Labor, "Fact Sheet on the American Family in Poverty," 1968).

While men often escape the responsibilities of child rearing, mothers rarely do, and they find themselves and their children locked in poverty. Not only does "another pregnancy" interfere with the mother's job and earning power, nothing lowers a family's economic standard of living more effectively than too many children.

Moreover, abortion laws chill and deter women from expressing their sexuality, as men are so permitted, in that they fill incalculably large numbers of women with dread and fear of sexual relations, even within marriage, because of the possibility of unwanted pregnancy, through contraceptive failure or human error.

C. Finally, we submit that the D.C. abortion law subjects women to involuntary servitude, contrary to the Thirteenth Amendment. There is nothing more demanding upon the body and person of a woman than pregnancy, and the subsequent feeding and caring of an infant until it has reached maturity some eighteen years later.

It is accepted in our society that an individual has the right and privilege of donating his time, his services or his possessions to another without compensation, or to *refuse* to do so unless suitable and adequate compensation is offered and given in return. Pregnancy and the rearing of children are the giving of one's time, one's services, and one's possessions and it should be the right and privilege of

a woman to do so of her own free will. A woman, becoming pregnant unintentionally and against her will, is denied by the District of Columbia abortion statute her constitutional right of freedom from involuntary servitude.

### CONCLUSION

The judgment of the District Court dismissing the indictment should be affirmed.

Respectfully submitted,

SYLVIA S. ELLISON

*Attorney, Human Rights for  
Women, Inc., as Amicus Curiae*

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Human Rights for Women, Inc. and its counsel wish to acknowledge the assistance of Margot Champagne, a student at Hastings College of the Law, University of California, in the preparation of this brief.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

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No. 84

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UNITED STATES, *Appellant*,

v.

MILAN VUITCH, *Appellee*.

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On Appeal From the United States District Court  
for the District of Columbia

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Brief for the Joint Washington Office for Social Concern,  
Representing the American Ethical Union, American  
Humanist Association and the Unitarian Universal-  
ist Association and for the Unitarian Universalist  
Women's Federation as Amici Curiae

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**OPINION BELOW**

The memorandum opinion of the United States Dis-  
trict Court for the District of Columbia is reported in 305  
F. Supp. 1032.

## **JURISDICTIONAL STATEMENT**

On November 10, 1969, the United States District Court for the District of Columbia entered an order dismissing the indictment on the ground that the statute upon which it was founded is too vague to meet the requirements of due process of law in criminal prosecutions and intimated that the statute in question denies equal protection of the law to certain people of the District of Columbia. Notice of appeal was duly filed by the Government on December 10, 1969. Jurisdiction of this court rests on Section 3731, Title 18, of the United States Code which authorizes an appeal by the Government from district courts direct to this court in criminal cases where the decision or judgment dismisses or sets aside an indictment on the ground of invalidity or construction of the statute upon which the indictment is founded.

## **QUESTIONS PRESENTED**

1. Whether the Court has jurisdiction.
2. Whether the District Court was correct in declaring the abortion statute to be unconstitutional by reason of its vagueness.
3. Whether the abortion statute by reason of its vague and imprecise language discriminates against women in low-income brackets in violation of due process and equal protection of the law.

## **STATUTES INVOLVED**

The Act of Congress, March 3, 1901, 31 Stat. 1322, ch. 854, Sec. 809, amended by Act of June 29, 1953, 67 Stat. 93, ch. 159, Sec. 203 (22-201 District of Columbia Code), provides in part that

Whoever, by means of any instrument . . . or other means whatever, procures or produces or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary



for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned. . . .

Title 18, Section 3731 of the United States Code provides in part that

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances: From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

### THE INTEREST OF AMICI CURIAE

The Joint Washington Office for Social Concern represents a cooperative effort by three groups to apply humanist ethics and liberal religion to major problems of American society. It recognizes abortion as one of those problems. Its concern over this question centers, *inter alia*, on the civil rights of women and on the obstacles placed by the abortion statute before women in economically disadvantaged circumstances.

The Unitarian Universalist Women's Federation is a group of church women who actively support efforts to achieve equal rights for women and to repeal abortion laws in the several states on the ground that such laws restrict freedom of choice on the part of women specifically and deny equal protection to women in general.

### STATEMENT OF THE CASE

The appellee, a licensed physician in the District of Columbia, was indicted in two counts charging him with violations of Section 22-201 of the District of Columbia Code (R. 2) otherwise known as the abortion statute.

He moved to dismiss the indictment (R. 11) on the ground of vagueness of the statute and alleged that in

effect it denies equal protection to people in certain economic and other groups subject to its sanctions.

After considering the briefs and background material in addition to argument of counsel the court granted appellee's motion and entered an order dismissing the indictment (R. 14).

After noting the two conditions under which abortions may be performed legally under the statute and, *inter alia*, the suggestion of impreciseness of the phrase "as necessary for the preservation of the mother's life or health" the court expressed the view that the word "health", which is not defined in the statute, "remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health" (App. 7).

The court held that the statute fails to give that certainty which due process of law requires in a criminal statute. Many defects were cited among which is the lack of a clear standard to guide either the doctor, the jury or the court and no determination as to what degree of mental or physical health or combination of the two is required to make an abortion legal or illegal under the Code.

It was noted that despite the general rule of noninterference by the law with medical judgment of physicians in treating their patients the inadequate and conflicting opinions now prevailing place the doctor in a "particularly unconscionable position" in abortion cases and that under the rule in *Peckham v. United States*, 96 U.S. App. D. C. 312 (1955), cert. denied 350 U.S. 912, and *Williams v. United States*, 78 U.S. App. D. C. 147 (1943), the burden of justifying his act shifts to the doctor once an abortion has been proved by the government. The court believed this to mean that the doctor is guilty and remains guilty unless a jury can be persuaded that his act was necessary for the preservation of the mother's life or health. The court held the view that a jury's

acceptance or nonacceptance of a doctor's interpretation of the "ambivalent and uncertain" word "health" should not determine the doctor's conviction and that his professional judgment made in good faith should not be challenged.

The court did not rule on all the issues raised but expressed the belief that "a far more scientific and appropriate statute could undoubtedly be framed than what remains of the 1901 legislation" and suggested that "Congress should re-examine the statute promptly in the light of current conditions".

## **ARGUMENT URGING AFFIRMANCE**

### **Summary**

The ineffective efforts by Congress and the legislatures of the several States to prohibit abortion have created a national problem which only this Court can correct.

The abortion statute of the District of Columbia, like the others, is conducive to crime and death and, like others, it has the effect of discriminating against women, particularly against women in low-income groups.

Because of the nature, scope and status of the abortion controversy and the difficulties resulting from the imprecise language of the statute it is important that this court review the judgment of the court below.

### **I. THE COURT HAS JURISDICTION OVER THIS APPEAL**

The question of jurisdiction of this Court is ably discussed by the Government and nothing needs to be added.

### **II. THE DISTRICT COURT WAS CORRECT IN DECLARING THE ABORTION STATUTE TO BE UNCONSTITUTIONAL BY REASON OF ITS VAGUENESS**

The word health has not been reduced to a uniform meaning. This is not the first time a court has been confronted with the word "health". Like so many words in the English language it is not confined to one interpreta-

tion or meaning and probably never will be. Webster defines it as a state of being hale or sound in body, mind or soul. These three words appear to be so inextricably bound together they cannot be separated in their relation to health. Since the word "soul" is rooted in theology rather than law the court's ability to interpret health as used in the statute without guidelines is not superior to that of a physician in making a decision to perform or not to perform an abortion. Only in the case of abortion is his ability questioned by laymen. And in no field are they less qualified to question.

The legal dilemma is confounded by the many qualifying adjectives attached to the word "health" in an effort to apply its meaning in various situations. The courts are continually confronted with it and have not yet succeeded in making it clear presumably because it defies clarity.

The word "health" in *Words and Phrases* (Vol. 19, p. 234) has 21 cross references including "feeble health", "ill health", "public health", "sound health" and "unsound health".

When used in connection with physical condition it includes appetite.<sup>1</sup> This connotes an understanding by the court that health does indeed include something other than physical condition possibly mental or spiritual.

Good health is not an absolute term.<sup>2</sup> The correctness of this statement cannot be seriously questioned since it is well known that women die from pregnancy without an attempt or desire to undergo an abortion. It is conceded that this is the exception rather than the rule but the desire to abort is also the exception.

The statute in question exempts the doctor from conviction in certain cases but never from prosecution if the

<sup>1</sup> *City of Cedartown v. Brooks*, 2 Ga. App. 583, 59 S.W. 836.

<sup>2</sup> *Bishop v. Metropolitan Mut. Assur. Co.*, 108 N.E.2d 830, 348 Ill. App. 386.

District Attorney elects to proceed against him. He is forced to justify his act to the satisfaction of a jury. If the defense attorney errs in selecting the jury the doctor may find himself in serious trouble if he fails to overcome a lurking prejudice which the attorney failed to discover.

The government need only to prove the abortion and from that point forward the doctor has the burden of proving himself innocent by justifying his act. If this interpretation of the statute is offensive to the Constitution it is because the statute leaves the court no opportunity to hold otherwise.

In further pursuit of the elusive meaning of "health" we find that bad temper is looked upon as a symptom of serious illness.<sup>3</sup> This is a reasonable layman's opinion. If "serious illness" is a state of health the opinion is supported by a Nebraska court which held that good health rests mostly in opinion.<sup>4</sup>

In another case an insurance company contended that a policy holder had misrepresented her condition of health by not revealing pregnancy at the time of making application. The court rejected the contention and held that the applicant's statement that she was in good health was not a misrepresentation though she was in fact pregnant at the time.<sup>5</sup> Apparently somebody thought pregnancy constituted bad or unsound health in which case our statute would require or at least permit abortion to preserve the mother's health.

It is well known that aside from death a pregnancy can and often does have adverse effects on the mother. This can happen even if the pregnancy is wanted. But if

<sup>3</sup> Abby, *The Sunday Star* (Washington) Aug. 23, 1970.

<sup>4</sup> *Willis v. Order of Railroad Telegraphers*, 139 Neb. 46, 296 N.W. 443.

<sup>5</sup> *American Order of Protection v. Stanley*, 5 Neb. (unof.) 132, 97 N.W. 467, 469.

"mental" is included as a facet of health it can be adversely affected by an *unwanted* pregnancy which is recognized as a source of anxiety.\* Health is complete physical, mental and social well being. The court was correct in holding that the statute lacks the certainty which due process of law considers essential in a criminal statute.

The manifest intent of Congress with respect to its meaning is manifest only to the extent revealed in the statute itself and no matter how good the intent the statute cannot be uniformly applied within the requirements of due process of law.

In an effort to persuade this Court to agree with its view that the appellee should be put to his defense the government urges that the statute be interpreted to include the defense of good faith. Such an interpretation would amend the statute and the court is not at liberty to do so. *Peckham v. United States*, 96 U.S. App. D.C. 312 (1955), cert. denied, 350 U.S. 912, and *Williams v. United States*, 78 U.S. App. D.C. 147 (1943), in effect, denies to the doctor in an abortion case the benefit of the rule which requires the government to prove his guilt. The defendant must prove his innocence by going forward with the evidence.

He is licensed and authorized by law to practice the healing arts on the basis of his training and tested knowledge. But he is prohibited from exercising a free and independent judgment concerning the life and health of a woman who is pregnant. In this one instance he must submit to an examination by a jury of laymen and if he fails the test he goes to jail. He may remove a healthy appendix or a dentist may extract a sound tooth if a patient should request it but a doctor may not perform an abortion without approval of a jury. The government, in effect,

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\* *The Law Breakers* by M. Stanton Evans and Margaret Moore, p. 163.

asks this Court to compel this appellee to submit to such a test.

It is incredible that a jury should be asked to make such decisions but few question the sacredness of the law which subjects a doctor to criminal prosecution if he performs an abortion and makes him prove the necessity of it in order to stay out of jail. It intrudes into the private lives of people and interferes with the judgment of a physician in the treatment of his patients.

Such terms as "reasonable time", "sacrilegious", "real price" and others have been targets of the void-for-vagueness rule.<sup>7</sup> If men of common intelligence must guess at the meaning or application of a term it is too vague to satisfy due process of law.<sup>8</sup>

All person including the appellee could form an opinion as to what the District statute means but nobody could pre-determine whether a jury which meets the standard of common intelligence would agree with his interpretation or send him to jail because they disagreed with him.

Definiteness has long been recognized as a standard of due process of law.<sup>9</sup> A doctor must decide under what conditions one abortion would be legal and another would not without benefit of statutory guidance and which or how many of his decisions would meet with the approval of a jury. The void-for-vagueness rule has developed over the years as a result of cases no less vague than the one now before the court. It follows, therefore, that the district court was correct and the judgment should be affirmed by this Court.

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<sup>7</sup> 109 Pa. L. Rev. 93 (1960).

<sup>8</sup> *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

<sup>9</sup> *Tozer v. United States*, 52 F. Supp. 917 (1892).

### III. The Abortion Statute Discriminates Against Women and Creates a Health Hazard <sup>10</sup>

Believed by some to be an instinctive drive, abortion in the human family is as old as history. It was fashionable among the ancient Greeks and Romans as a means of preserving the youthful figure. Even Hippocrates advised a young harpist how to end her pregnancy. Plato would have made it mandatory after 40.

Prior to 1870 Japan controlled her population by infanticide. In the so-called lower strata of the animal kingdom the practice of abandoning the young or killing them outright at birth is so well known it needs no documentation.

With the advent of the Judaic-Christian ethic abortion fell into disfavor and was declared by St. Augustine to be murder. The woman was severely punished. The enormity of her sin was determined by the degree of advancement. Abortion after animation barred the fetus from the celestial realm and relegated it to *limbus infantum*. Today it is widely regarded as murder if the abortion is induced but not as death of a human if it is spontaneous. The most

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<sup>10</sup> This material is the result of a study of books, articles and papers by professional people who have expressed concern over the problems related to abortion in America, principally as follows:

Abortion in America, edited by Harold Rosen, M.D., Ph.D., Beacon Press, is a collection of works by noted authorities.

Society, Crime and Criminal Careers, Don C. Gibbons, Prentice Hall, Inc., Englewood Cliffs, N. J.

The Healers, Anonymous, M.D., G. P. Putnam's Sons, New York, N.Y., p. 151.

Harriet Pilpel, a New York lawyer, in The Case for Legalized Abortion, p. 97.

Jerome M. Kummer, Psychiatrist, Assoc. Clinical Professor of Psychiatry, Univ. of California at Los Angeles, School of Medicine, in The Case for Legalized Abortion, p. 114.

Newsweek, Apr. 13, 1970, p. 53.

New York Times, June 8, 1970, p. 29, col. 1.

Washington Post, Feb. 24, 1970, p. B 2.



vigorous opposition comes from the Catholic religion. Modern day attitudes concerning abortion have their roots in this concept. It is an unconscious prejudice in the guise of morality.

If social caste cannot be identified by the clothes women wear it can be identified by the kind of abortions they buy. With money, abortions may easily be obtained—even in the shadow of the legislative halls where they were banned. The degree of legality is measured by the money the woman can pay. The price paid by the poor is often death—always blood, sweat and tears.

Because of this economic inequality, matched only by human desperation, areas in large city hospitals are reserved for women who have sought the only kind of abortions available to them. They are desperately ill. Many die while their affluent sisters receive tender care in comfortable facilities under the watchful eye of a dependable medical technician.

The malady is not restricted to teen age girls and the unmarried. Wives suffer the consequences, including death, along with the others. The greatest number of abortions are sought by married women.

No matter what the intent of Congress may have been when the statute was passed these are the conditions which it preserves: not the lives and health of women. There is nothing to show and no reason to believe that the District of Columbia is excluded from the system which operates universally.

It degrades and discriminates against women by reason of their economic status and denies to them the right of choice as free people. It also corrupts the medical profession.

Many doctors are unwilling or reluctant to perform this delicate service for their patients because of the risk involved. It is damaging to their reputation to be accused

of engaging in unlawful practices. If the doctor acts in good faith but the jury does not believe him his good faith does him no good. To meet this problem, human ingenuity has found a way—for those who can pay. Those who can not pay find their own way—a way far less desirable. Often fatal. If the odious word is replaced with a scientific, sanitary term the operation is successful, the district attorney has more time to devote to other pressing matters and everybody is happy. The happy patient can and probably will refer legitimate business to the doctor. If he forces her to seek medical help elsewhere by refusing to give the relief she desperately desires he stands to lose. This he cannot afford.

It can be argued that the law was designed to prevent such abuse. But that cannot be. These innovations are of more recent vintage and the poor construction of the statute brought about the abuse.

Much of the practice escapes legal opposition although it is technically proscribed by law. But when difficulty arises the woman becomes the pawn on the chessboard. Although she is as guilty as the doctor she must testify against him. The doctor has fallen from grace and for his mistake he is driven into the illegitimate practice of abortion—his only means of earning a living—and the bitter fruits of the law are again harvested by women who cannot afford the better kind. This is the tangible result of abortion statutes.

Although accurate statistics are difficult to obtain, abortions in the United States are estimated to be in excess of a million a year. In New York City 93 per cent of the therapeutic abortions are on white women. 42 per cent of the pregnancy-related deaths result from out-of-hospital abortions. Fifty per cent of these are Negro and 44 per cent Puerto Rican. About one-third of the out-of-hospital abortions are performed by doctors.

The efficiency of modern medical knowledge makes abortion-related deaths unnecessary. Therefore, the conclusion

is forced upon us that the deaths which do occur are the direct result of legislation which cannot be interpreted in the context of medical need.

It is not yet a popular view that the nation's disturbing crime problem and others are traceable at least indirectly to abortion statutes. However, a good case has been made for it.

The abortion statute considers only the life or health of the mother without regard for the life or health of the child after it is born.

No statute can compel a prospective mother to accept her offspring mentally and emotionally and no statute can compel her to give the child the kind of emotional security it needs and must have if it is to become a healthy adult. Some women are simply not capable of doing so. They never achieve the capacity for maternal responsibility and most women do not welcome it at *all* times. If pregnancy is forced upon her, which is often the case, particularly in the case of her rejection if she desires abortion, it can result in a maternal rejection of the child. This condition can begin *before birth*. This will affect the child's life as long as it lives. Child guidance clinics and juvenile courts are filled with children who were born in a background of maternal rejection. Where this occurs it can result in schizoid personality, gang delinquents and criminal psychopaths.

The District statute and others similarly worded would forbid an abortion even if it could be predicted that the mother would kill the child at birth like the mother in the zoo who is deprived of her natural environment.

A husband can prevent a doctor from performing an abortion on his wife. His wishes are superior. In a survey of ten cases where abortion was denied, seven by the hospital and three by the husband, one committed suicide, six had criminal abortions, one divorced her husband im-

mediately after the birth, one killed herself and all her children and one registered as a single woman and obtained an abortion. In some cases wives are forced by their husbands to secure an abortion even when they would prefer to have the child. In either case it is the husband who decides rather than the wife.

Clearly, then, the abortion statute discriminates against women and creates a dangerous health hazard. Health, good or bad, is too important to be committed to the judgment of juries.

### CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

LOLA BOSWELL,  
*Attorney for Amici Curiae*

September, 1970

OFFICE OF THE CLERK

No. 84

UNITED STATES

MILAN VUTICH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR AMICI CURIAE

American Civil Liberties Union  
and  
American Civil Liberties Union Fund  
Of The National Capital Area

Ralph Temple

1434 182 Street, N.W.  
Washington, D.C.

Melvin E. Wolf

156 Fifth Avenue  
New York, New York

Of Counsel:

Marvin J. Diamond

813 Conn. Ave., N.W.  
Washington, D.C. 20006

Norman G. Zinky

630 Wilshire Blvd.  
Los Angeles, Calif. 90048

September 10, 1970

Attorneys for Appellee

American Civil Liberties Union

American Civil Liberties Union Fund

2201 K Street, N.W.

Washington, D.C. 20007

# Supreme Court of the United States

OCTOBER TERM, 1970

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No. 84

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UNITED STATES,

*Appellant.*

v.

MILAN VUITCH,

*Appellee*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

## BRIEF FOR AMICI CURIAE

American Civil Liberties Union

and

American Civil Liberties Union Fund  
Of The National Capital Area

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## INTEREST OF AMICI CURIAE

The parties have consented to the filing of this amicus curiae brief. Copies of their letters of consent are being submitted to the Clerk with the brief.

The interest of the American Civil Liberties Union and the American Civil Liberties Union Fund of the National Capital Area stems from their work as civil liberties organizations. It is the view of the ACLU that the penumbra of constitutionally protected, non-enumerated rights require that every woman, as a part of her right to the enjoyment of life, liberty and privacy, should be free to determine

when and whether to bear children. Since the District of Columbia anti-abortion statute abridges these rights without a compelling state interest, Amici believe it to be unconstitutional.

In its brief below, the ACLU argued the merits of the constitutional issues raised in this case. Since those arguments will be adequately presented to this Court by the appellee, the ACLU has chosen not to burden the Court unnecessarily with its own statement of those legal arguments. In this regard we support the position of the appellee on the merits.

However, in its letter to counsel for the parties on June 29, 1970, this Court questioned whether it should accept jurisdiction. The ACLU believes that it is imperative that this Court render a decision on the merits of this case as soon as possible. It is hoped that the arguments here presented may be of aid to the Court in its consideration of the above question.

## ARGUMENT

The Court has asked if it should, "... as a matter of sound judicial administration, abstain from accepting jurisdiction pursuant to 18 U.S.C. Sec. 3731 because the case involves the validity of a statute the application of which is confined to the District of Columbia?" Amici suggest that there are factors other than the scope of applicability of the statute which dictate that the Court should entertain jurisdiction.

The Government has ably demonstrated for this Court the procedural subtleties and consequences of the overlap of D.C. Code Sec. 23-105 and the Criminal Appeals Act, 18 U.S.C. Sec. 3731. See Brief for the United States, pp. 10-22. The ACLU agrees with the Government that once a direct appeal is properly filed in this Court under Section 3731 of the Criminal Appeals Act, this Court *must* accept jurisdiction over that appeal and therefore lacks the discretionary power to dismiss or transfer the appeal. Since the

decision below was based upon the invalidity of D.C. Code Sec. 22-201, this Court has jurisdiction in the instant case and is the proper appeal forum.

# **I. THE IMPORTANCE OF THE ISSUES PRESENTED WARRANTS ACCEPTANCE OF JURISDICTION BY THIS COURT**

Should this Court reject the concept of mandatory jurisdiction under Section 3731, it should exercise its discretion and accept jurisdiction.<sup>1</sup> Whatever merit there may be to a general policy of awaiting an initial decision by the U.S. Court of Appeals for the District of Columbia Circuit is here more than outweighed by the urgency and magnitude of the constitutional issues involved, and the direct impact which a decision by this Court on the merits will have upon the statutes in most states.

## **A. A Decision on the Merits Herein Will Affect Similar Statutes in Most Other States**

Although the application of the statute is limited to the District of Columbia, a decision by this Court will, of course, have broader consequences. Of the fifty states in the nation, plus the District of Columbia and Puerto Rico, thirty-four have statutes restricting abortions which use language which the court below held to be unconstitutionally vague.<sup>2</sup> At least ten other states have modified their anti-

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<sup>1</sup>This Court, upon accepting jurisdiction, is not limited to review of the vagueness issue, but may consider the other significant issues raised below which challenged the validity of D.C. Code Sec. 22-201. See *United States v. Harris*, 347 U.S. 612; *United States v. Kahriger*, 345 U.S. 22; *United States v. C.I.O.*, 335 U.S. 106; and *United States v. Classic*, 313 U.S. 299; in all of which, on appeal pursuant to 18 U.S.C. Sec. 3731, the Court considered issues raised before the District Court even though those issues had not been ruled upon below.

<sup>2</sup>See *Ala. Code* tit. 14 § 9 (1958) ("... unless the same is necessary to preserve her life or health . . ."); *Ariz. Rev. Stat. Ann.* § 13-211 (1956) ("... unless it is necessary to save her life . . ."); *Conn. Gen. Stat. Ann.* § 53-29 (1960) ("... unless the same is necessary



abortion statutes, eliminating "necessary to preserve" phraseology, but nonetheless retaining restrictions which permit

to preserve her life or that of her unborn child . . . ."); *Fla. Stat. Ann.* § 782.10 (" . . . unless the same shall have been necessary to preserve the life of the mother . . . ."); *Idaho Code Ann.* tit. 18 § 601 (" . . . necessary to preserve her life . . . ."); *Ill. Ann. Stat.* Ch. 38, § 23-1 (" . . . necessary for the preservation of the woman's life."); *Ind. Ann. Stat.* § 10-105 (" . . . necessary to preserve her life . . . ."); *Iowa Code Ann.* § 701.1 (" . . . necessary to save her life . . . ."); *Ky. Rev. Stat. Ann.* § 436.020 (1963) (" . . . necessary to preserve her life . . . ."); *La. Rev. Stat.* § 14:87 (1950) (" . . . unless done for the relief of a woman whose life appears in peril . . . ."); *Me. Rev. Stat. Ann.* tit. 17 § 51 (" . . . necessary for the preservation of the mother's life . . . ."); *Mass. Gen. Laws Ann.* Ch. 272 § 19 (prohibits unlawful abortions, interpreted by court to allow abortions by a surgeon if, " . . . necessary for the preservation of the life or health of the woman." *Kudish v. Bd. of Registration*, 248 N.E.2d 264 (1969)); *Mich. Stat. Ann.* § 28.204 (" . . . necessary to preserve the life of such woman . . . ."); *Minn. Stat. Ann.* § 617.18 (" . . . unless the same is necessary to preserve her life or that of the child with which she is pregnant . . . ."); *Miss. Code Ann.* § 2223 (" . . . necessary for the preservation of the mother's life . . . ."); *Mo. Rev. Stat.* § 559:100 (" . . . unless the same is necessary to preserve her life or that of an unborn child . . . ."); *Mont. Rev. Codes Ann.* § 94-401 (" . . . necessary to preserve her life . . . ."); *Neb. Rev. Stat.* § 28-405 (" . . . necessary to preserve the life of such woman . . . ."); *Nev. Rev. Stat.* Ch. 201.120 (" . . . necessary to preserve her life or that of the child with which she is pregnant . . . ."); *N.H. Rev. Stat. Ann.* § 585.13 (" . . . unless by reason of some malformation or of difficult or protracted labor, it shall have been necessary, to preserve the life of the woman . . . ."); *N.J. Stat. Ann.* § 2A:87-1 (prohibits abortions when done maliciously or without lawful justification; lawful justification has been interpreted as perhaps being limited to the preservation of the mother's life. *State v. Moretti*, 393 U.S. 952 (1968); *N.D. Cent. Code Ann.* § 12-25-01 (" . . . necessary to preserve her life . . . ."); *Ohio Rev. Code Ann.* § 2901.16 (necessary to preserve her life . . . ."); *Okla. Stat.* tit. 21 § 861 (" . . . necessary . . . to preserve her life . . . ."); *P.R. Laws Ann.* tit. 33 § 1053 (" . . . necessary to preserve her life . . . ."); *R.I. Gen. Laws Ann.* § 11-3-1 (1956) (" . . . necessary to preserve her life . . . ."); *S.D. Com. Laws Ann.* § 22-17-1 (" . . . necessary to preserve her life . . . ."); *Tenn. Code Ann.* § 39-301 (1955) (" . . . to preserve the life of the mother . . . ."); *Tex. Pen. Code Ann.* arts. 1191-1196 (" . . . for the purpose of saving the life of the mother . . . ."); *Utah Code Ann.* § 76-2-1 (" . . . necessary to preserve her life . . . ."); *Vt. Stat. Ann.* tit. 13 § 101 (1959) (" . . . necessary to preserve her life . . . ."); *Wash. Rev. Code* § 9.02.010 (" . . .

doctors to perform abortions only in certain specified situations.<sup>3</sup>

A decision on the merits in this case will affect most if not all of these statutes,<sup>4</sup> and will have a direct impact upon a critical social and health problem that is national in scope.

That there exists today a rising nationwide concern over the status of anti-abortion laws need not be documented for this Court. The press regularly carries stories of the introduction in state legislatures of bills to reform or repeal

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necessary to preserve her life or that of the child whereof she is pregnant . . . ."); *W. Va. Code* § 61-2-8 (" . . . with the intention of saving the life of such woman or child . . . ."); *Wis. Stat. Ann.* § 940.04 (" . . . necessary . . . to save the life of the mother . . . ."); *Wyo. Stat. Ann.* § 6-77 (" . . . necessary to preserve her life . . . .").

<sup>3</sup>See *Ark. Stat. Ann.* § 41-304 (1969 Pocket supp. to 1947); *Cal. Health & Safety Code* § 25951; *Colo. Rev. Stat. Ann.* § 40-2-50; *Ga. Code Ann.* § 26-1202; (1969 Rev.); *Kan Gen. Stat. Ann.* § 21-3407; *Md. Ann. Code art. 43* § 149E; *N.M. Stat. Ann.* § 40A-5-1 (1953); *N.C. Gen. Stat.* § 14-45.1; *Ore. Laws Ch. 684* § 3 (1969); *Va. Code* § 18.1-62.1 (1963).

<sup>4</sup>Several suits challenging the constitutionality of anti-abortion statutes on grounds similar, if not identical, to those raised in the instant case are currently at various stages of litigation in the federal courts. *McCann v. Babbitz*, 310 F.Supp. 293 (E.D. Wisc., 1970) (declared Wisconsin anti-abortion statute unconstitutional), *appeal docketed*, No. 297, October Term 1970, 38 U.S.L.W. 2498 (June 20, 1970); *Doe v. Bolton*, Civ. Case 13676 (N.D. Ga., July 27, 1970) (declared Georgia anti-abortion statute unconstitutional in part); *Crossen v. Breckenridge*, Civ. No. 2143 (E.D. Ky., June 15, 1970) (suit dismissed), *appeal pending* before the Sixth Circuit; *Roe v. Wade*, Civ. Action 3-3690B (N.D. Texas, June 17, 1970) (declared Texas anti-abortion statute unconstitutional); *Planned Parenthood v. Nelson*, Civil 70-334, (D.C. Ariz.) (case pending); *Benson v. Johnson*, Civ. No. 70-226 (D.C. Ore.) (case pending). A decision on the merits in this case would benefit sound judicial administration by eliminating the developing multiplicity of suits in this area.

these laws, and of positions being taken by professional and religious organizations concerned with this increasingly crucial social issue. Until this Court acts on the merits of this case, or one like it, there will remain over the constitutional issues here involved a cloud that will interfere with effective legislative reform and with the very personal rights of thousands of persons, mostly women, who are directly affected by anti-abortion statutes and practices.

These anti-abortion laws, which are so regularly being violated, had their genesis in the nineteenth century and represented an application of then prevalent notions of population growth and sexual morality, and of particular concern for the health of women based on then current surgical and antiseptic standards.<sup>5</sup> The severe limitations upon abortion practices codified in such state legislation did not represent either the long-standing common law view which treated termination of a pregnancy as a crime only after quickening,<sup>6</sup> nor did it agree with basic historical concepts. Abortion was available to some degree in civilizations of Greece and Rome and throughout Western civilization and was not considered criminal or immoral before quickening.<sup>7</sup>

Representatives of virtually every segment of our society (except for those minority religious groups whose doctrines prohibit it) have now publicly proclaimed that a woman has the constitutional right to determine whether or not to

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<sup>5</sup> Lader, *Abortion* 89-90 (1966).

<sup>6</sup> *Hunter v. Wheate*, 53 App. D.C. 206, 289 F. 604 (1923); *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194, cert. denied, 397 U.S. 915 (1969); and see opinion below, 305 F.Supp. at 1034.

<sup>7</sup> For summaries of the history of abortion in Western and Anglo-Saxon law, see Commentary on Draft No. 9 of the Model Penal Code, p. 148 n. 12; Williams, "The Law of Abortion," 2 *Current Legal Problems* 128 (1949); and R. Hahnel, "The Artificial Abortion in Antiquity," 29 *Arch Geschicht Med* 224, summarized in Geigersham, *Annotated Bibliography of Induced Abortion* (1969).

carry a pregnancy to term, and that a doctor has the constitutional right to provide her with complete medical advice and services free of restraint from criminal laws which are not founded upon a compelling and countervailing state interest. The failure of society and of the law to recognize the existence of these non-enumerated rights until recent years does not impair their constitutionally protected status nor preclude this Court from recognizing them. As the Court said in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669:

We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics" . . . Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.

The significance to this Court of the wide national concern over the availability of abortions should be its indication that the time has come for an authoritative resolution of the constitutional questions presented by this case.

#### **B. Anti-Abortion Laws Have Created a Significant Health Problem**

The current interest in this issue is certainly justified. The extent of human injury and suffering caused by anti-abortion laws is profound.<sup>8</sup> A conservative estimate of the number of illegal abortions in the United States each year is one million.<sup>9</sup> Other estimates vary as high as one and a half times that figure, although by the nature of the prob-

<sup>8</sup>See Geigersham, *Annotated Bibliography of Induced Abortion* (1969).

<sup>9</sup>A. Rossi, *Public Views on Abortion*, in Guttmacher, *The Case for Legalized Abortion Now* 27 (1967); Lader, *Abortion* 2-3 (1966).

lem no fully reliable estimate can be made.<sup>10</sup> Contrary to one of the current popular social myths, it is not the promiscuous teenager or college girl who most frequently seeks an abortion; by far the majority of women involved are married women who, because of economic circumstances, difficulties with their marriage or children, or for similar reasons, feel that they do not want another child at the time of the pregnancy.<sup>11</sup>

Criminal abortions are the largest single cause of so-called maternal mortality in the United States.<sup>12</sup> The incidence of criminal abortion represents a public health problem of a magnitude perhaps equalled only by cancer and heart disease.<sup>13</sup>

By forcing great numbers of women to turn to criminal abortionists, anti-abortion laws have created this severe public health problem. Investigators have estimated that five thousand women in the United States die each year from criminal abortions, and that illegal abortions induced by persons without medical training result in a death rate of one per ten abortions. This rate compares with the rate of three deaths per 100,000 abortions for legal abortions performed in hospitals by qualified medical practitioners.<sup>14</sup>

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<sup>10</sup> Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion*, 46 N. Caro. L. Rev. 730 (1968).

<sup>11</sup> Lader, *Abortion* 58-59 (1966); G. Hardin, "Abortion and Human Dignity," in Guttmacher, *The Case for Legalized Abortion Now* 71 (1967).

<sup>12</sup> Niswander, "Medical Abortion Practices in the United States," 17 *West. Res. L. Rev* 403 (1965).

<sup>13</sup> Gold, Erhardt, Jacogziner & Nelson, "Therapeutic Abortions in New York City: A 20-year Review," 55 *Am. J. of Pub. Health* 964, 970-971 (1965).

<sup>14</sup> Bates & Zawadski, *Criminal Abortion*, 3-4 (1964); C. Tietze, "Mortality with Contraception and Induced Abortion," 45 *Studies in Family Planning* 6-8 (1969).

The incidence of severe infection from criminal abortion is, as would be expected, much greater than the incidence of death.<sup>15</sup>

The brunt of this health problem has fallen upon the poor. As the Task Force on Administration of Justice of the President's Commission on Law Enforcement and Administration recently stated, "[I]t is primarily the uneducated and poor who must resort to hole-in-the-wall abortions."<sup>16</sup>

### CONCLUSION

At issue here are novel questions that directly affect substantial and basic rights of life and liberty. The rights asserted by the Appellee are too basic, and the questions presented too urgent, to be ignored or avoided, even for a short period of time. For the reasons described above, the

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<sup>15</sup>See Stevenson & Yang, "Septic Abortion with Shock," 83 *Am. J. Obst. & Gynec.* 1229 (1962).

<sup>16</sup>Task Force [on Administration of Justice] Report: The Courts 105 (1967). The Report also noted that:

Abortion laws are another instance in which the criminal law, by its failure to define prohibited conduct carefully, has created high costs for society and has placed obstacles in the path of effective enforcement . . . . These factors produce the spectacle of pervasive violations but few prosecutions.

\* \* \*

The present state of the law presents particularly acute problems for conscientious parents and physicians faced with weighty reasons for terminating pregnancy in a jurisdiction where the law is restrictive or its standards are vague and uncertain. Since some highly reputable physicians regard the law as an injustice and want to protect their patients against incompetent abortions available on the black market, large numbers of reputable citizens find themselves in the position of law violators. This tends to contribute to antagonism and resentment toward those who enforce the law . . . . *Id.*

ACLU respectfully urges this Court to accept jurisdiction in this case and to consider the merits of the constitutional issues presented.

Respectfully submitted

Ralph Temple

1424-16th Street, N.W.  
Washington, D.C.

Melvin L. Wulf

156 Fifth Avenue  
New York, New York 10010

*Attorneys for Amici Curiae*

American Civil Liberties Union  
American Civil Liberties Union  
Fund of the National Capital  
Area

*Of Counsel:*

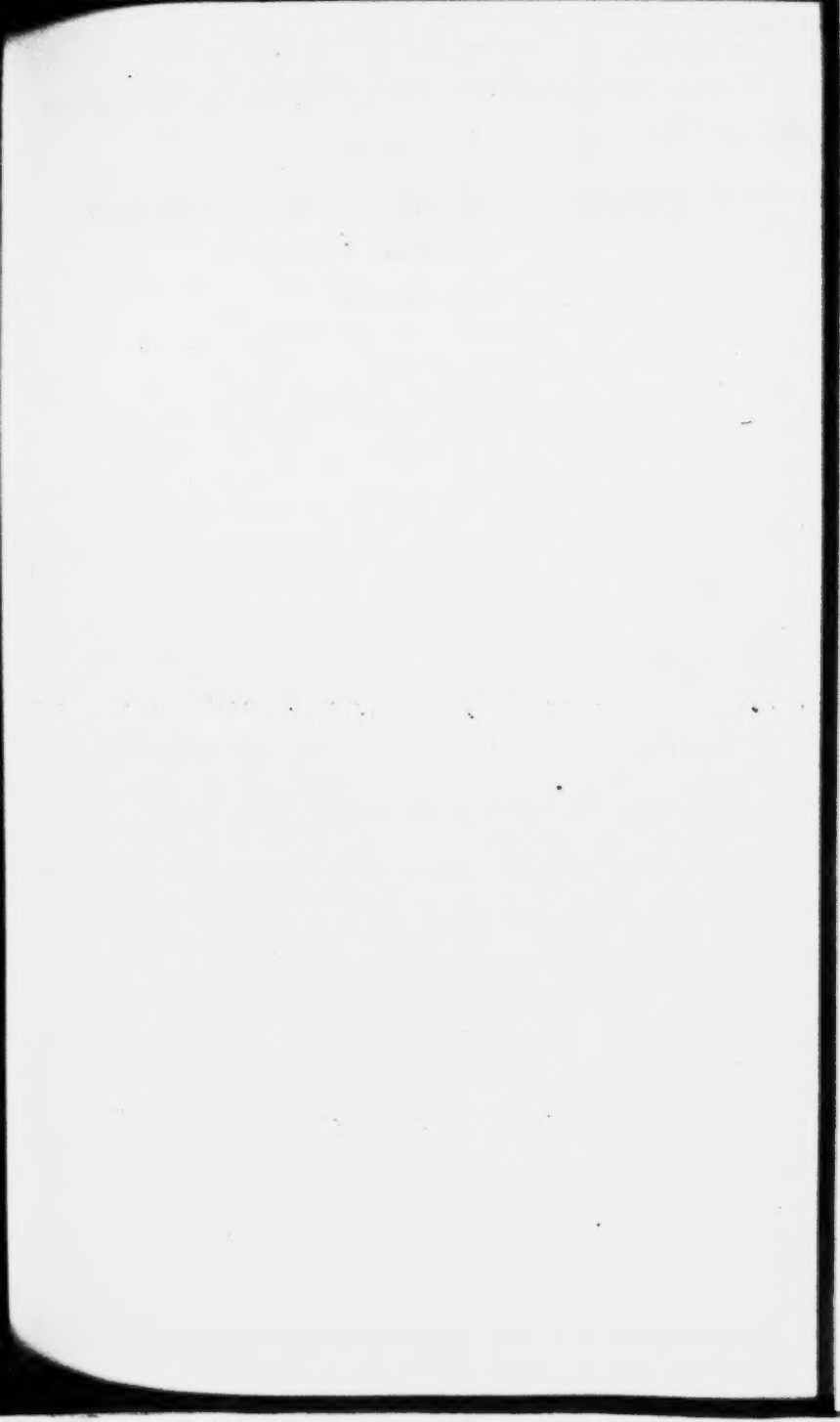
Marvin J. Diamond

815 Conn. Ave., N.W.  
Washington, D.C.  
20006

Norma G. Zarky

6380 Wilshire Blvd.  
Los Angeles, Calif.  
90048

September 10, 1970





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IN THE

**Supreme Court of the United States**

ROBERT SEAVER, CLERK

OCTOBER TERM, 1970

**No. 84**

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UNITED STATES OF AMERICA,

*Appellant,*

—v.—

MILAN M. VUITCH, M.D.,

*Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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## BRIEF FOR MILAN M. VUITCH, M.D.

---

JOSEPH SITNICK

1511 K Street, N. W.  
Washington, D. C. 20005

JOSEPH L. NELLIS

1819 H Street, N. W.  
Washington, D. C. 20006

ROY LUCAS

Four Patchin Place  
New York, New York 10011

*Attorneys for Milan M. Vuitch, M.D.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

**No. 84**

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UNITED STATES OF AMERICA,

*Appellant,*

—v.—

MILAN M. VUITCH, M.D.,

*Appellee.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**BRIEF FOR MILAN M. VUITCH, M.D.**

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**Questions Presented**

- I. Whether This Court Has Jurisdiction Under 18 U.S.C. §3731 to Entertain a Direct Appeal From a Decision of the United States District Court for the District of Columbia Dismissing an Indictment on the Ground of the Invalidity of the Statute on Which the Indictment Is Founded, Where the Statute Is an Act of Congress, but Applies Only in the District of Columbia.

- II. Whether This Court Should Decline Jurisdiction Under 18 U.S.C. §3731, Where the District Court's Decision in This Case Could Have Been Taken to the United States Court of Appeals for the District of Columbia Pursuant to D.C. Code §23-105, When to Do So Would Overturn an Express Decision by One Coördinate Branch of the Federal Government—the Executive—to Avail Itself of a Statutory Alternative Expressly Provided by a Second Coördinate Branch of the Federal Government—the Congress—Based Solely Upon a Construction of 18 U.S.C. §3731 Which Is at Best Implicit in the Statute's Language.
- III. Whether Disposition of This Appeal on the Merits Should Include Consideration of the Constitutional Claims Raised by the Motion to Dismiss, Supported by Briefs and Argument, and Considered by the District Court, Although Not Fully Ruled Upon, Where Remand for Trial Would Not Materially Advance the Inquiry on Those Points.
- IV. Whether D.C. Code §22-201, Which Forbids a Physician to Perform a Therapeutic Abortion Unless "Necessary for the Preservation of the Mother's Life or Health" Is Unconstitutionally Vague and Indefinite, on Its Face and as Applied, Where the Statute Provides a Wholly Inadequate Warning to the Physician, Jury, and Judge of Which Physical, Mental, or Social Conditions May Be Taken into Consideration When Assessing Necessity.



- V. Whether D.C. Code §22-201, as Applied to Impose Upon a Physician the Burden of Proof That an Abortion Was "Necessary for the Preservation of the Mother's Life or Health," Deprives Physicians of Liberty Without Due Process of Law by Eroding the Presumption of Innocence and Invading the Privilege Against Self-Incrimination.
- VI. Whether D.C. Code §22-201 Deprives Physicians and Their Patients of Rights Protected by the First, Fourth, Fifth, and Ninth Amendments, and Is Void by Reason of Overbreadth, Where the Statute Is Neither Narrowly Drawn nor Supported by any Compelling or Legitimate Governmental Interests.

### Statement of the Case

Appellee Milan M. Vuitch, M.D., a licensed and practicing physician in the District of Columbia, was charged by indictment (App. at 2, 3) with two alleged violations of D.C. CODE §22-201, a statute of 1901 vintage.<sup>1</sup> Dr. Vuitch moved before trial to dismiss both indictments on the following grounds:

"1. The statute . . . under which the indictment is brought is unconstitutional on its face and as applied to him.

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<sup>1</sup>The indictments charged that Dr. Vuitch had produced abortions upon two patients, one on February 1, 1968, the other on May 1, 1968. Neither indictment averred that the abortions were not "necessary for the preservation of the [woman's] life or health . . ." D.C. CODE §22-201. The absence of such averment itself may be fatal to the indictments, as implied by *Williams v. United States*, 138 F.2d 81 (D.C. Cir. 1943); and *Crichton v. United States*, 92 F.2d 224, 225 (D.C. Cir.), *cert. denied*, 302 U.S. 707 (1937).

"2. The language of the statute as applied to a physician is vague.

"3. The statute interferes with the physician-patient relationship.

"4. The statute unconstitutionally restricts the patient's right of privacy and freedom of choice . . ."  
(App. at 4).

The motion to dismiss, filed October 15, 1960, relied in large part upon the arguments set out in *California v. Below*,<sup>1</sup> a decision of special relevance handed down only six weeks earlier by the Supreme Court of California.

After the receipt of extensive briefs, and oral argument, the district court, Gesell, J., granted the motion and dismissed the indictments against Dr. Vuitch.<sup>2</sup> Judge Gesell addressed himself to three major contentions urged by Dr. Vuitch, but based the decision on the principal ground that the statute as interpreted was unconstitutionally vague and indefinite, in violation of the due process clause of the Fifth Amendment. 305 F. Supp. at 1034.

The district court recognized that

"the motions attack the statute for vagueness, allege that its practical operation denies equal protection to certain economic and other groups . . . and assert a constitutional right of all women . . . to determine whether or not they shall bear a child." 305 F. Supp. at 1033.

<sup>1</sup> 71 Cal.2d —, 458 P.2d 194, 80 Cal. Rptr. 354 (Sept. 5, 1969), cert. denied, 397 U.S. 915 (1970).

<sup>2</sup> A companion case, *United States v. Boyd*, 305 F. Supp. 1032, 1035-36 (D.D.C. 1969) (not appealed), went the other way, Boyd, a non-physician, had been charged with performing abortions.

Moreover, there was no need for extended hearings and testimony because "the materials cited in the briefs . . . are of such common understanding . . . ." 305 F. Supp. at 1033.

Relying for the most part upon his conclusion that the statute was too vague, Judge Gesell nonetheless agreed that "the statute unquestionably impinges to an appreciable extent on significant constitutional rights of individuals." 305 F. Supp. at 1034. Reliance was placed on decisions by this Court such as *Griswold v. Connecticut*<sup>4</sup> and *Loving v. Virginia*.<sup>5</sup> These decisions were

"an increasing indication . . . that as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy." 305 F. Supp. at 1035.

In addition, decisions by the United States Court of Appeals for the District of Columbia were seen to raise grave questions under the Fifth Amendment with respect to the presumption of innocence and the privilege against self-incrimination.<sup>6</sup> Those decisions held that

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<sup>4</sup>381 U.S. 479 (1965). *Griswold* recognized as against state action, "a right of privacy older than the Bill of Rights—older than our political parties . . . ." 381 U.S. at 486, and extended constitutional protection to "the traditional relation of the family—a relation as old and as fundamental as our entire civilization . . . ." 381 U.S. at 496 (Goldberg, J., concurring).

<sup>5</sup>388 U.S. 1 (1967).

<sup>6</sup>*Peckham v. United States*, 226 F.2d 34 (D.C. Cir.) (per curiam), cert. denied, 350 U.S. 912 (1955); and *Williams v. United States*, 138 F.2d 81 (D.C. Cir. 1943), were cited as examples. Only *Williams*, however, actually decided the point. *Peckham* held that proof of pregnancy was irrelevant to commission of the offense.

"upon the Government establishing that a physician committed an abortion, the burden shifted to the physician to justify his acts. In other words, he is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health." 305 F. Supp. at 1034.

Since the Government's establishing of an abortion could not *per se* justify a verdict of *illegal* abortion, Judge Gesell thought the Circuit Court's holdings "may well offend the Fifth Amendment . . . as interpreted in recent decisions such as *Leary v. United States*,<sup>7</sup> and *United States v. Gainey*."<sup>8</sup> Nonetheless, while recognizing potential merit in other points argued to the Court, Judge Gesell decided the case upon the principal ground that the statute was riddled with multifold uncertainties that could not be remedied. Hence, the statute was void for vagueness, and in violation of the due process clause of the Fifth Amendment.

In light of the above, it is clear that Dr. Vuitch raised the full range of constitutional questions. This was expressly done both in the motion to dismiss the indictment, and in reliance upon *California v. Belous*, *supra*. Moreover, the district court fully considered all questions, although deciding only one. Thus, it is incorrect to suggest that "several broad constitutional issues were presented to the court below by an *amicus curiae* . . . ." *Brief for the United States*, at 8; *id.* at 22-23. Moreover, the Appellants are incorrect in stating that *California v. Belous*,

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<sup>7</sup> 395 U.S. 6 (1969).

<sup>8</sup> 380 U.S. 63 (1965).

*supra*, rested solely on vagueness grounds. *Brief for the United States*, at 5 n. 3. Even a cursory reading of *Belous* shows that several presumptively definite constructions of the California anti-abortion law were rejected because they would infringe a "fundamental right of the woman to choose whether to bear children . . . ." *Belous* was by no means limited to vagueness.

## ARGUMENT

### Jurisdiction

#### I.

**This Court Has Jurisdiction Under 18 U.S.C. §3731 to Entertain a Direct Appeal From a Decision of the United States District Court for the District of Columbia Dismissing an Indictment on the Ground of the Invalidity of the Statute on Which the Indictment Is Founded, Where the Statute, Although an Act of Congress, Applies Only in the District of Columbia.**

Dr. Vuitch does not contest the jurisdiction of this Court over a direct appeal such as the present. The language, legislative history, and decisions construing 18 U.S.C. §3731 (1964 ed.), all point to one conclusion. At its option, the United States may appeal directly to this Court from a decision of the United States District Court for the District of Columbia dismissing an indictment based upon an unconstitutional statute, where the statute, although an Act of Congress, applies only in the District of Columbia.

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\*71 Cal.2d at —, 458 P.2d at 199, 80 Cal. Rptr. at 359.

The *Supplemental Memorandum of Appellee, Supplemental Memorandum for the United States, and Brief for the United States*, at 10-16, fully elaborate the jurisdictional point. Dr. Vuitch does not disagree with the conclusion. Moreover, no further supporting authorities have been found.

## II.

**The District Court's Decision in This Case Could Have Been Taken to the United States Court of Appeals for the District of Columbia Pursuant to D.C. Code §23-105, but This Court Should Not Decline Jurisdiction Under 18 U.S.C. §3731, Because to Do So Would Overturn an Express Decision by One Coördinate Branch of the Federal Government—the Executive—to Avail Itself of a Statutory Alternative Expressly Provided by a Second Coördinate Branch of Federal Government—the Congress—Based Solely Upon a Construction of 18 U.S.C. §3731 Which Is at Best Implicit in the Statute's Language.**

The existence of D.C. CODE §23-105 raises the possibility that the United States might have an option to appeal a case such as the present one to the United States Court of Appeals for the District of Columbia. In exercising that option, the United States presumably would make an executive determination that the case lacked sufficient national import to warrant a direct appeal here. Appeal would then be taken pursuant to D.C. CODE §23-105, as was done in *United States v. Sweet*, 399 U.S. 517 (1970) (per curiam). And, as *Sweet* holds, this Court would respect the executive determination authorized by Congress in §23-105.

A similar need to respect the determinations of the Executive and Congress underlies the present procedural question. Acts of Congress, although frequently confined to the District of Columbia, often relate to questions of tremendous national concern. Indeed, with respect to criminal law and procedure, such Acts may be designed as models for the fifty states. While the present criminal statute permits abortion to preserve both the woman's "life" and "health," and is therefore unlike any state abortion law other than that in Alabama,<sup>10</sup> Dr. Vuitch claims that such a restriction is not only vague, but overbroad, in that its potential sweep drastically invades matters left by the Constitution to the private decision of the pregnant woman, other members of her family, and her physician. This claim of overbreadth entails implications for the abortion laws of the forty-seven states which, unlike New York, Alaska, and Hawaii, still consider the outcome of an unwanted pregnancy to be a matter between a majority of legislators and the physician and/or pregnant woman.

Assuming, then, that 18 U.S.C. §3731 (1964 ed.), need not always be utilized by the Executive, the present case

<sup>10</sup> See ALA. CODE tit. 14, §9 (Recomp. 1958) ("unless the [abortion] is necessary to preserve her life or health . . ."). Twenty-nine states exclude preservation of "health." *E.g.*, 40A MINN. STAT. ANN. §617.18 (1964); 2A TEXAS PENAL CODE art. 1196 (1961). Twelve states, following MODEL PENAL CODE §230.3(2) (Proposed Official Draft, 1962), permit abortions in accredited hospitals for reasons of physical and/or mental health. *E.g.*, MD. CODE ANN. art. 43, §149(E)-(G) (Supp. 1970) ("substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the [woman]. . ."). In 1970, three states enacted legislation—New York, Alaska, and Hawaii—along lines subsequently embodied in the UNIFORM ABORTION ACT (2d Tent. Draft Aug. 1970), which leave the reasons for abortion up to the physician and patient. *E.g.*, [1970], N.Y. Laws ch. 127, at 170, amending N.Y. PENAL LAW §125.05(3) (McKinney 1967).



is one in which the option has been exercised. Dr. Vuitch agrees that the course of appeal has been designated by Congress, subject to certain Executive options, and that this Court lacks discretionary authority to overturn the considered judgment of the other departments of government by rejecting the appeal.

### Scope of Review

#### III.

**Disposition of This Appeal on the Merits Should Include Consideration of the Constitutional Claims Raised by the Motion to Dismiss, Supported by Briefs and Argument, and Considered by the District Court, Although Not Fully Ruled Upon, Because Remand for Trial Would Not Materially Advance the Inquiry on Those Points.**

The *Brief of the United States*, at 22-26, asks this Court to resolve only the vagueness point, which was central to the disposition below. As Dr. Vuitch has pointed out, however, additional constitutional arguments were raised below, briefed, argued, and examined by the district court. The Government would ask that this litigation be carried out in piecemeal fashion, with each issue litigated from the district court to this Court, in sequence, until all procedural and substantive points had been fully adjudicated by all judges in each possible forum. Remand for further hearings, however, would not materially promote the ultimate resolution of this case. This is the lesson taught by the numerous lower courts that have passed on the "overbreadth" claims raised herein.



*California v. Belous*<sup>11</sup> is a first example. In that case the Supreme Court of California invalidated the pre-1967 California anti-abortion law as unduly vague and overbroad. Dr. Belous had been tried and convicted of conspiracy to violate the anti-abortion statute. The trial, however, was concerned with the facts of the offense, not with factual background for the constitutional claims. Indeed, none of the facts developed at the trial turned out to have the least bearing upon the ultimate decision. The decision relied upon recognized medical literature to bolster its conclusions. A trial as to this factual background would have been no more than an endless conflict between competing experts from opposing camps. The conflict has already been mooted in the medical journals at length and in depth. It need not be inscribed into thousands of pages of trial transcript to be brought to this Court's attention.

Judge Gesell recognized below that "judicial notice" could be taken "of the materials cited in the briefs." 305 F. Supp. at 1033. Similar federal decisions, by statutory three-judge courts, have recognized that the overbreadth question is a matter of constitutional law. The restrictions on abortion in Wisconsin,<sup>12</sup> Texas,<sup>13</sup> and Georgia<sup>14</sup> were all examined and declared unconstitutionally overbroad without the need for an extended trial. Dr. Vuitch has presented

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<sup>11</sup> 71 Cal.2d —, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), cert. denied, 397 U.S. 915 (1970).

<sup>12</sup> *McCann v. Babbitz*, 310 F. Supp. 293 (E.D. Wis.) (per curiam), appeal docketed, 38 U.S.L.W. 3524 (U.S. June 20, 1970) (No. 297, Oct. 1970 Term).

<sup>13</sup> *Roe v. Wade*, — F. Supp. —, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam).

<sup>14</sup> *Doe v. Bolton*, — F. Supp. —, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam).

the relevant medical literature in this *Brief* and the *Motion to Affirm*. There is no reason to remit the case for what, in effect, would be a reargument of substantive points brought out fully below.

*Dandridge v. Williams*<sup>18</sup> teaches the propriety of an Appellee's urging on appeal grounds for decision that were briefed and considered below, but not relied upon by the lower court. As Mr. Justice Stewart stated:

"The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court. . . .

"The issue having been fully argued both here and in the District Court, consideration of the [issue] is appropriate." 397 U.S. at 475 n. 6.

The Court in *Dandridge* sustained the Maryland maximum grant regulation on both statutory and constitutional grounds, the lower court having rested solely on the latter. By the Government's theory here, this Court in *Dandridge*, having rejected the constitutional arguments, should have remanded the case to the district court for an opinion on the statutory construction claims. The Court's more sensible approach, however, avoids piecemeal litigation, and resolves important public questions in a timely fashion. Here, as in *Dandridge*, a substantive decision will directly affect the lives of many thousands of people. Not only has the lower court heard argument on the merits, but numerous other district courts have resolved substantially similar overbreadth claims.

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<sup>18</sup> 397 U.S. 471 (1970).

## The Merits

### IV.

**D.C. Code §22-201, Which Forbids a Physician to Perform a Therapeutic Abortion Unless "Necessary for the Preservation of the Mother's Life or Health" Is Unconstitutionally Vague and Indefinite, on Its Face and as Applied, Because the Statute Provides a Wholly Inadequate Warning to the Physician, Jury, and Judge of Which Physical, Mental, or Social Conditions May Be Taken into Consideration When Assessing Necessity.**

***A. The District Court's Decision Properly Accorded Dr. Vuitch Standing to Challenge the Statute on Its Face***

The Government contests Judge Gesell's decision to consider Dr. Vuitch's challenge to the District of Columbia anti-abortion statute *on its face*, rather than *as applied* to whatever facts might have developed at an evidentiary hearing. In allowing the defense to attack the facial validity of the statute, however, the lower court was not only in accord with the three-judge federal court decisions rendered in Wisconsin,<sup>16</sup> Texas,<sup>17</sup> and Georgia,<sup>18</sup> but also appears to have recognized that no substantial class of instances exist to which the statute could be applied without substantial post-offense reconstruction, and concomitant lack of fair warning. Moreover, failure to consider the statute on its face would have compounded the deterrence of the entire class of physicians who suffer under the

<sup>16</sup> *McCann v. Babbitz*, *supra* note 12.

<sup>17</sup> *Roe v. Wade*, *supra* note 13.

<sup>18</sup> *Doe v. Bolton*, *supra* note 14.

burden of a law with such significant possibilities for prosecutorial abuse.

The substantive rights of individual liberty and privacy asserted by Dr. Vuitch follow from the recognition in *Griswold v. Connecticut*,<sup>19</sup> of "a right of privacy older than the Bill of Rights—older than our political parties . . ."<sup>20</sup> which surrounds with constitutional protection "the traditional relation of the family—a relation as old and as fundamental as our entire civilization . . ."<sup>21</sup> The constitutional basis for these rights will be developed in greater depth, *infra*, at pp. 34 to 69. For the present, however, it is important to note the significance attached to these rights by the *Griswold* decision. So important did *Griswold* consider the right of privacy, that physicians had standing to assert the right on behalf of "the married people with whom they have a professional relationship." 381 U.S. at 481. Following the *Griswold* rationale, Dr. Vuitch should have standing to test the facial validity of the statute, because it invades the privacy rights of that broad class of patients, with infinitely variable physical and mental "health" situations, who are prevented from obtaining abortions because physicians generally fear prosecution.

One cannot conceal from judicial notice the general inhibiting effect of the statute by pointing to an absence in the record of evidence to that fact. Physicians in the District of Columbia more often than not, for example, are members of the American Medical Association. That Association in June of this year called for an approach to

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<sup>19</sup> 381 U. S. 479 (1965).

<sup>20</sup> 381 U.S. at 486.

<sup>21</sup> 381 U.S. at 496 (Goldberg, J., concurring).

abortion which would leave the decision up to physician and patient, after consultation, provided the abortion was performed in an appropriate medical facility.<sup>22</sup> This is evidence of dissatisfaction with existing laws. Such dissatisfaction derives from inability to practice sound medicine, taking into consideration all of a patient's health and personal needs, when the physician's definition of "health" might not agree with that of a local prosecutor, or jury, and the difference entails a possibility of being "imprisoned in the penitentiary not less than one year or not more than ten years . . .," D.C. CODE §22-201, as well as revocation of the physician's license to practice medicine, D.C. CODE §2-123. In no other area of law's relationship to medicine must a physician work under such a drastic threat of punishment.

Accordingly, it is not speculative to conclude that the D.C. abortion law drastically inhibits the practice of medicine, and the access of patients to this particular form of medical treatment. If this were not so, the A.M.A. would have no reason to adopt a policy position contrary to what is presently allowed by law. Nor would leaders of the medical profession have given their support to litigation brought to contest similar laws in other jurisdictions. *See Brief of the Association of the Bar of the City of New York and a Group of Physicians as Amici Curiae*, at i-xi, *Hall v. Lefkowitz*,<sup>23</sup> *Amicus Curiae Brief on Behalf of Medical*

<sup>22</sup> See N.Y. Times, June 26, 1970, at 1, col. 1. The text of the official position has not yet been published in J.A.M.A., although the Journal recently noted that only 26 physicians had resigned from the body because of the new policy. See 213 J.A.M.A. 1242 (Aug. 24, 1970).

<sup>23</sup> 305 F. Supp. 1030 (S.D.N.Y. 1969), *dismissed as moot*, Op. No. 36939 (S.D.N.Y. July 1, 1970) (per curiam) (statute repealed three days before oral argument on merits).

*School Deans and Others in Support of Appellant, at 2, California v. Belous.*<sup>24</sup>

In light of the constitutional stature of the rights asserted by Dr. Vuitch, and the pervasive impact which the challenged statute invariably has upon the practice of medicine, the validity of the statute must be assessed on its face, not by the piecemeal process of hammering out its permissible contours on a case-by-case basis.

**B. The Statute Is Facially Invalid Because There Are No Substantial Classes of Situations to Which Its Terms Could Apply Without Objectionable Vagueness**

**The Legal Standard**

A vast body of case law exists on the problem of unconstitutional uncertainty.<sup>25</sup> This doctrine has, moreover, several complementary, and several competing strands. The test most frequently articulated has been that

“a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process . . . .”<sup>26</sup>

<sup>24</sup> 71 Cal.2d —, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), cert. denied, 397 U.S. 915 (1970).

<sup>25</sup> See generally Amsterdam, *The Void for Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORN. L.Q. 195 (1955); Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 631 (1923); Freund, *The Use of Indefinite Terms in Statutes*, 30 YALE L.J. 437 (1921); Note, 62 HARV. L. REV. 77 (1948).

<sup>26</sup> *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

This is partly because

"it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large."<sup>27</sup>

Clearly, "[v]ague laws in any area suffer a constitutional infirmity,"<sup>28</sup> be they of common law antiquity,<sup>29</sup> administrative,<sup>30</sup> or criminal.<sup>31</sup> Furthermore, statutes challenged for vagueness which impinge upon sensitive human rights are to be closely scrutinized. *Griswold v. Connecticut* dealt with "a right of privacy older than the Bill of Rights . . ."<sup>32</sup> and that right is invoked again here, as well as the right to give medical advice, which is more nearly a facet of pure freedom of speech. Thus, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."<sup>33</sup>

This Court has never ruled on a vagueness challenge to a similar statute, but the invalidity of the language follows

<sup>27</sup> *United States v. Reese*, 92 U.S. 214, 221 (1875).

<sup>28</sup> *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966) (ancient common law offense of "criminal libel" void for uncertainty).

<sup>29</sup> *Lanzetta v. New Jersey*, 306 U.S. 451, 454-55 (1939); *Chaplin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 242-43 (1932). See also *United States v. Evans*, 333 U.S. 483 (1948), in which the statute had been passed in 1917; and *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), in which the statute had been passed in 1860.

<sup>30</sup> See, e.g., *Keyishian v. Regents*, 385 U.S. 589 (1967).

<sup>31</sup> *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

<sup>32</sup> 381 U.S. 479, 486 (1965).

<sup>33</sup> *NAACP v. Button*, 371 U.S. 415, 438 (1963).

from an analysis of the difficulties a physician must face in applying it.

***Vagueness of the Statute in Practice***

Both medical and legal commentary have recognized the uncertainty of American abortion laws. Retired Justice Clark recently remarked:

"The increasing number of abortions subjects physicians to increased dangers of liability for incorrectly interpreting a statute . . . . [D]octors face an uncertain fate when performing an abortion. This uncertainty will continue unless the legislatures or courts provide relief from liability."<sup>44</sup>

Christopher Tietze, M.D., perhaps internationally the most knowledgeable authority on abortion practices and statistics, commented

"The application of these laws, however, varies greatly between localities and between hospitals."<sup>45</sup>

Similarly, a 1967 study concluded:

"Abortion policies vary not only from hospital to hospital but also from service to service within the same

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<sup>44</sup> Tom C. Clark, *Religion, Mortality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA UNIV. (L.A.) L. REV. 1, 7 (1969) [hereafter "Clark"].

<sup>45</sup> Tietze, *Maternal Mortality Associated With Legal Abortion*, Proceedings of the Fifth International Conference on Planned Parenthood 24 (Oct. 1955) (Tokyo); see also M. CALDERONE, *ABORTION IN THE UNITED STATES* 34-35, 52 (1958):

"[N]ecessity as a sine qua non of performing an abortion . . . leaves the doctor's position perilous and uncertain. . . . The current laws provide no accurate criteria by which the doctor can govern his actions."



hospital. They also vary widely from doctor to doctor on the same service of the same hospital."<sup>26</sup>

And, as Dr. Alan F. Guttmacher indicated in an early study, "[t]he doctor's dilemma lies in the phrase 'preserving the life of the woman.'"<sup>27</sup> If "preserving life" is a difficult standard, then "preserving health" only accentuates the "doctor's dilemma."

The medical profession has no experience in applying the provisions of felony statutes to the day-to-day practice of their science. It is not an offense to perform an appendectomy far in advance of rupture, and when only necessary to prevent a risk that might never materialize. General malpractice principles, which take all circumstances into account, govern the physician's everyday practice, not the criminal law. Nor is an instance of malpractice *per se* ever a cause for license revocation, much less criminal prosecution, unless so serious, wanton, and reckless as to constitute criminal negligence. While the physician's professional role is directed toward preserving a patient's health, that term is used in its broadest sense:

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<sup>26</sup> Hall, *Abortion in American Hospitals*, 57 AM. J. PUB. HEALTH 1933, 1935 (1967). Dr. Hall continues:

"The victim of all this confusion is, of course, the American female . . . [S]he must find Doctor X in hospital Y with policy Z in order to have it done." *Id.*

For a vivid illustration of the variations among hospitals in assessing the legality of therapeutic abortion on a given set of facts, see the questionnaire study and analysis of results in Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 423 (1959). The study is discussed and relied on in *California v. Belous*, 71 Cal.2d —, —, 458 P.2d 194, 205 n. 14, 80 Cal. Rptr. 354, 365 n. 14 (1969).

<sup>27</sup> Guttmacher, *Therapeutic Abortion: The Doctor's Dilemma*, 21 J. MT. SINAI HOSP. 111 (1954).

"Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."<sup>28</sup>

In no sphere of medicine other than abortion does a criminal statute impose such a burden upon a physician, and in no other sphere of medical practice is treatment restricted by criminal law to those instances in which it is "necessary for the preservation of the mother's life or health." The Court might consider the impact on the lives of all citizens if a penal statute prohibited gall bladder surgery, kidney stone removal, the prescription of contraceptives,<sup>29</sup> use of antibiotics, vaccination, or even the taking of aspirin "unless necessary for the preservation of the life or health" of the patient. There are and never have been such laws or practices, outside of the quite different realm of drug regulation. It is from this area that Appellant has drawn *Linder v. United States*, 268 U.S. 5 (1925), and *Boyd v. United States*, 271 U.S. 104 (1926), on which great reliance was placed (J.S., at 7; Brief, at 36).

*Linder* and *Boyd* involved the question of a physician's dispensing "hard" narcotics (i.e., morphine and cocaine).

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<sup>28</sup> *Constitution of the World Health Organization*, in BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.).

<sup>29</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965), at least implies that such a requirement would violate the patient's right of privacy, but Connecticut, for obvious reasons, made no such contention.

The statute required that this be done "in the course of his [the physician's] professional practice only."<sup>40</sup> This Court found in *Linder* that "[w]hat constitutes *bona fide* medical practice must be determined upon consideration of evidence and attending circumstances." 268 U.S. at 18. This was not a decision, as Appellant stated, that "the statute was subject to an absolute defense of good faith belief by the physician that the drugs were appropriate for treatment of the addict" (J.S., at 7; Brief, at 36).

In several respects *Linder* and *Boyd* are inapposite and inapplicable. Trafficking in hard narcotics is socially reprehensible conduct, for which statutory standards of specificity need not be so stringent. Abortion, like contraception, however, involves sensitive individual rights, see *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), and most frequently the "intimate relation of husband and wife and their physician's role in one aspect of that relation." Privacy in family planning is today a value which government promotes. Moreover, the problem of hard narcotics is susceptible to much sharper analysis than that of abortion. One can separate out the physician who helps an addict withdraw from one who feeds a habit for profit. With abortion, however, there is no such line, and the statute has not drawn an intelligible point of demarcation.

Many physicians consider a woman's strong personal desire not to be compelled to have further children, as sufficient justification for abortion. A study conducted by the journal *Modern Medicine* in fact showed that 51% of American physicians, and 61.4% of physicians in the District of Columbia agreed without qualification that abor-

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<sup>40</sup> Harrison Narcotic Law, 38 Stat. 785, as amended, 40 Stat. 1130.

tion should be available to any woman capable of giving legal consent upon her own request to a competent physician.<sup>41</sup> The sphere of medical judgment, in such a case, then narrows to the question of whether medical reasons exist for *not* performing the requested abortion, a circumstance which is exceedingly rare (and unregulable by the blunderbuss of a criminal statute) in this day when abortion in early pregnancy is seven times *safer* than its alternative—childbirth.<sup>42</sup>

In fact, if one compares the relative safety of childbirth and medically induced abortion in early stages of pregnancy, he will necessarily conclude that abortion in almost all cases is "necessary for the preservation of the [woman's] life or health." D.C. Code §22-201. This is the case because childbirth today carries a considerably more significant risk to the woman's survival than abortion.

Tietze published a study in September of 1969 which summarized the relevant data as follows:

*"Mortality associated with legal abortion performed in hospital, at an early stage of gestation: 3 deaths per 100,000 abortions . . . ."*<sup>43</sup>

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<sup>41</sup> *Modern Medicine*, Nov. 3, 1969, at 18-24. An additional 11.8% nationally and 11.2% in the District agreed to the proposition, but with some qualification.

<sup>42</sup> See Tietze, *Mortality With Contraception and Induced Abortion*, 45 *STUDIES IN FAMILY PLANNING* 6 (1969).

<sup>43</sup> Tietze, *Mortality With Contraception and Induced Abortion*, 45 *STUDIES IN FAMILY PLANNING* 6 (1969) (emphasis in original). For further substantiation of the safety of early abortion on healthy women under appropriate medical conditions, see Tietze, *Abortion Laws and Abortion Practices in Europe* (1969); Tietze, *Abortion*

*"Maternal Mortality from complications of, or associated with, pregnancy, child-birth, and the puerperium, excluding induced abortion: 20 deaths per 100,000 pregnancies."* " . . . . .

*"Mortality associated with highly effective contraception: 3 deaths per 100,000 users per year . . . ."* "

Moreover, physicians in states with liberalized practice are increasingly discarding conventional concepts about the need for hospitalization. A recent study by physicians at the University of California, San Francisco, School of Medicine showed relatively few complications following therapeutic abortions done on an outpatient basis.<sup>40</sup> The researchers concluded that

*"the conventional 12- to 48-hour hospital admission for aspiration abortion patients serves no real purpose either in preventing or discovering postabortal complications."* "

Accordingly, the conscientious physician who takes into account the physical, mental, and personal needs of his

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in Europe, 57 AM. J. PUB. HEALTH 1923 (1967); Tietze & Lewit, *Abortion*, 220 Scientific American 3 (Jan. 1969); Kolblova, *Legal Abortion in Czechoslovakia*, 196 J.A.M.A. 371 (1966); Mehland, *Combating Illegal Abortion in the Socialist Countries of Europe*, 13 WORLD MED. J. 84 (1966).

<sup>40</sup> *Id.*, based on the United States "rate of maternal mortality, excluding abortion, [which] was 18 per 100,000 live births in 1964-66." *Id.*

<sup>41</sup> *Id.*, citing Inman & Vessey, *Investigation of Deaths from Pulmonary and Cerebral Thrombosis and Embolism in Women of Child-bearing Age*, 2 BRIT. MED. J. 193 (1968).

<sup>42</sup> Margolis & Overstreet, *Legal Abortion Without Hospitalization*, 36 OBST. & GYNEC. 479 (1970).

<sup>43</sup> *Id.* at 481.

patient, faces an insoluble dilemma in construing the statute. It is hopelessly vague. There are "health" justifications<sup>48</sup> for performing an abortion upon a "healthy" patient, because continued pregnancy could lead to dangers in childbirth, as well as adverse consequences to "health" brought about solely on account of her being forced to bear a child against her will. A physician can never know how the prosecutor, grand jury, trial judge, or jury of non-peer laymen will understand the term "health." If medical men cannot agree on the contours of the "health" concept, non-medical men are likely to indulge in interpretations which range from a need to protect the patient's immediate existence to the broader definition set out by the World Health Organization.

Where the "intent" of Congress lies, no one can know. Indeed, the Government has virtually conceded the facial invalidity of the statute by recognizing the futility of any construction cast in language other than that of the physician's subjective intent. How, one might ask, can the physician intend that which cannot be defined? There is no class of instances where abortion is plainly unnecessary<sup>49</sup>

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<sup>48</sup> A 1943 decision delivered by then Associate Justice Arnold of the Court of Appeals for this Circuit found that this provision of the statute "is a broad exception without precise limits." *Williams v. United States*, 78 U.S. App. D.C. 147, 150, 138 F.2d 81, 84 (1943). Compare *Musser v. Utah*, 333 U.S. 95, 97 (1948) ("acts injurious to public morals" may include "almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health [etc.] . . .").

<sup>49</sup> The statute also gives no indication as to which of the possible meanings of "necessary" applies, nor the factors which may permissibly be taken into account. The judge and jury are permitted to consider any factors they choose. A statute which permitted only "necessary" noise was recently struck down by a district court in Pennsylvania. *Phillips v. Borough of Folcroft*, 305 F. Supp. 766 (E.D. Pa. 1969) (J. S. Lord, III, J.). This Court in *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926) (Taft, C.J.), has described the

to achieve legitimate health objectives. The dangers of childbirth to a woman who has an unwanted pregnancy will always exceed any hypothetical medical disadvantages of an abortion.

**C. *The Statutory Construction Suggested by the Government Would Increase the Uncertainty of Coverage, and Render the Statute Meaningless to an Extent Beyond Any Possible Coverage Supported by Legislative History***

The Government seeks to salvage the statute by recommending an *ad hoc* determination in each case, focusing upon whether "the defendant, although a licensed physician, does not exercise 'medical' judgment" in performing the questioned abortion (*Brief for the United States*, at 28; *id.* "medical judgment"; *id.* at 29 "hard-core" conduct"; *id.* at 32 "good faith"; *id.* at 37 n. 29 "bona fide pre-abortion examination," "arguable health grounds"). Such efforts to hold on to the statute, by importing a lawyer's misunderstanding of the practice of medicine into the operating room, are a serious encroachment upon the physician's and patient's need to have clear guidelines, or none at all (beyond those provided for *all* forms of medical practice by malpractice law and administrative licensing sanctions).

A requirement that a physician prove he exercised "good faith" and rendered a "medical judgment" is even more uncertain than the statute's requirement of necessity for preservation of "health." The Government does not define "medical judgment," nor can a ready definition be found. This could mean a carefully reasoned judgment that the patient fits the statute. That approach, however,

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term "necessary" as one of "great indefiniteness," 271 U.S. at 517, "a vague requirement and one objectionable in a criminal statute." 271 U.S. at 518. It is indeed.

brings one back to the multiple ambiguities of the statute. To render a "good faith" "medical judgment" that the statute is satisfied would surely require that the statute itself be reasonably specific, which it is not.

Equally far fetched are interpretations which withhold the criminal sanction where "arguable health grounds" existed, or where there was a "bona fide pre-abortion examination." "Arguable" health grounds may have been clear to both physician and patient, but unpersuasive to prosecutor and jury. Similarly, the Government's unelucidated notion of a "bona fide pre-abortion examination" would enmesh court and jury in preposterous determinations of how long and what kind of pelvic examinations a physician must make to be exempt from criminal liability. Congress could hardly have intended to regulate the duration and quality of pelvic examinations when enacting in 1901 a statute on abortion.

A more serious defect in the Government's proposed interpretation is its consequence for the physician and patient. If one supposes that two physicians perform two abortions under identical circumstances, but one physician personally feels his act was illegal, while the other does not, only the former will be guilty because the latter acted in good faith. Both, however, to establish good faith, must bring forth proof in their own defense. If the subjectively guilty physician is a good actor, and conceals his original state of mind, but the innocent physician acts poorly, and becomes confused on cross-examination, the verdicts may conflict with reality. Under the statute, of course, neither physician will ever know whether he actually violated the intent of Congress. Yet, the subjective evaluation of his testimony by a randomly drawn jury of non-peer laymen will serve as a future guide of sorts to



the entire District of Columbia medical profession. Congress could never have intended such bizarre consequences when enacting this statute.

Appellant submits that the only sensible analysis of the statute is one which candidly recognizes its hopeless ambiguity. The efforts of lawyers to inject relevant meaning into the provisions of the law in question can only subvert the role of Congress and confuse the medical profession. In 1901, when the statute was passed, medicine was in a period of relative infancy. Wonder drugs, complex surgery, concepts of physical vs. mental health, and the entire modern-day realization of the patient's complexity were unknown quantities. It is not unkind to state in 1970 that a statute, presumably valid when passed, has become too vague in light of intervening medical and intellectual developments. Accordingly, there is no impropriety in this Court's invalidating the statute for vagueness, and inviting Congress to make a fresh start, taking into account the medical opinion of 1970, and the advances in medical science over the last sixty-nine years. Indeed, the impropriety would lie in attempting to salvage some remnant of the statute, by seeking to discern some possible construction to save at least the skeleton of what was passed in 1901. Particularly is this the case, where the Government's suggested constructions would open the door to prosecutorial indiscretion. In recognition of the impropriety of engrafting vague exceptions onto an already vague statute, this Court should exercise judicial restraint. Restraint in the present case entails deference to the role of Congress in casting the language of statutes. That role cannot be preserved unless the Court takes the only course which will remit the case to Congress. That course is a candid holding that Congress expressed itself imperfectly in 1901, and must reconsider the question. For this reason, the statute should be declared void on its face.

## V.

**D.C. Code §22-201, as Applied to Impose Upon a Physician the Burden of Proof That an Abortion Was "Necessary for the Preservation of the Mother's Life or Health," Deprives Physicians of Liberty Without Due Process of Law by Eroding the Presumption of Innocence and Invading the Privilege Against Self-Incrimination.**

The settled law of the District of Columbia holds that necessity for an abortion is entirely a matter of justification for the defense. Neither the indictment, apparently, nor the prosecution, need aver or prove that the abortion was unnecessary. Judge Arnold, writing in *Williams v. United States*, 138 F.2d 81 (D.C. Cir. 1943), stated the question as follows:

"[W]hether the statute making abortion a crime in the District of Columbia puts the burden on the prosecution to prove as a part of its case that the operation was not necessary for life or health."

Answering the question in the negative, the *Williams* court sustained the conviction of a non-physician for abortion although "[n]o evidence was offered by the government to support" a finding of lack of necessity. Defendant Williams had based her denial of guilt upon the theory that she had no connection whatever with the aborted woman, a defense theory inconsistent with the possibility of an affirmative defense of justification.

In two respects this District rule violates the constitutional rights of Dr. Vuitch as it would be applied in any trial on the charges pending against him.

As a preliminary point, one must note that the underpinnings of the *Williams* case have been seriously eroded in the ensuing twenty-seven years since 1943. No longer is "abortion . . . generally regarded as heinous in character." The American Medical Association and the Commissioners on Uniform States Laws do not generally recommend conduct deemed heinous. Today the taboo surrounding the word "abortion" has been lifted. The subject is debated in its full significance, and judged by more sophisticated standards than those which prevailed in 1943 when manpower was needed to fight a major war.

Similarly, the fear expressed by *Williams* of "the alarming death rate . . . due to secret operations by unskilled criminal abortionists" is more beside the point today, with modern antibiotics, than it was in 1943. In either case, it was the felony punishment for abortion which promoted secrecy, not the nature of the operation itself. Physicians, chilled by the prospect of prosecution under a statute which *Williams* described as containing "a broad exception without precise limits," were most unlikely to risk their liberty, license, and livelihood for the patient's sake, unless the necessity was beyond debate in any quarter, including the most hostile. Today, both the high death rate and the secrecy are no more. The wealthy patient can afford massive psychiatric documentation of danger to her "health," or can fly to a jurisdiction with more specific and lenient laws on abortion. Only the underprivileged minority is left with the midwife and kitchen knife, and they have access to the emergency rooms, if not the private pavilions, of local hospitals for recovery.

The light assumption in *Williams* that an accused has more ready access to proof of necessity for abortion will

also not stand up under scrutiny. The prosecution has complete access to all facts which occurred outside the operating room, including any information which might pertain to the patient's "health" prior to the abortion. Moreover, the prosecution may, by post-abortion examination of the patient, gather further evidence from her and examining physicians. In no case need the patient fear self-incrimination, for she can be guilty of no offense, regardless of the pervasive role she plays in inducing a physician to perform the abortion. See *Hunter v. Wheate*, 53 App. D.C. 206, 289 Fed. 604 (1923). Thus, she can be compelled to testify, and to provide leads for the full range of evidence that may be necessary to convict.

In addition, the constitutional rights to a presumption of innocence, and the privilege against self-incrimination, have grown in stature since 1943. Prosecutorial convenience does not weigh so heavily today as then, nor are defendants lightly put to the task of describing the very acts with which they are charged, in order to convey an impression sufficiently different from that of the prosecution's case to create a reasonable doubt in the minds of the jurymen.

The felony abortion statute, as construed in *Williams* violates the due process clause of the Fifth Amendment by reversing the presumption of innocence, because the physician must take the burden upon himself of proving that the abortion was necessary to preserve the woman's "health." To undertake such proof, the physician must first waive any defense based upon not having participated at all in the alleged offense. He must admit what the indictment states, that he performed the abortion, and prove that the act was justified.

A long line of decisions by this Court, carefully reviewed by the Eighth Circuit *en banc* in *Stump v. Bennett*, 398 F.2d 111 (8th Cir. 1968) (*en banc*), establishes the presumption of innocence on its constitutional plane. As this Court stated in *Deutch v. United States*:

"One of the rightful boasts of Western civilization is that the [prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure.' *Irving v. Dowd*, 366 U.S. 717, 729. Among these is the presumption of the defendant's innocence." 367 U.S. 456, 471 (1961).

Plainly, this right is invaded when a physician can be convicted solely because he performed an abortion, and without further proof.

Necessity is not a collateral matter, like self-defense. With respect to abortion, the circumstances under which the procedure was undertaken go to the very heart of the matter. It is not every abortion which the statute condemns, but only a special, opaquely defined class. *Williams* incorrectly states that the exceptions are collateral and affirmative justifications. In every case, however, the center of the controversy will be whether the abortion in question fell within the exception. Abortions *per se* are no offense. It is only unnecessary abortions which the statute proscribes. Under a broad definition of "health," there are few, if any, unnecessary abortions. Under other definitions, there may be more, or many. By presuming that all abortions are legally unnecessary, the Government may convict, as it did in *Williams*, upon no more than a showing persuasive to the jury, that the physician performed the abor-

tion. It is presumed, unless the physician shows otherwise, that the abortion was unnecessary. In other words, District practice under *Williams* presumes, upon proof of one element of the offense, that the second element is present, that the accused is guilty. This presumption of guilt cannot stand in light of the constitutional status of the presumption of innocence under the due process clause of the Fifth Amendment.<sup>60</sup>

A related infirmity of the *Williams* rule inheres in its inevitable invasion of the Fifth Amendment privilege against self-incrimination. *Williams* requires that the physician bring forth evidence that the abortion was necessary to preserve the patient's "health." This means that the accused physician stands mute at penalty of certain conviction because of his failure to testify. If he testifies, however, he must admit the very fact of the abortion, i.e., complicity in one element of the offense, and then attempt to persuade the jury that the second element of the offense was not present. If the jury finds his "health" justifications insufficient, or that his "good faith" was not "good enough," the physician has been convicted upon his own testimony. Moreover, if the jury had not believed the prosecution's evidence that an abortion was performed, the physician's testimony could supply proof from his own mouth of *both* elements of the offense.

*Leary v. United States*, 395 U.S. 6 (1969), teaches that the *Williams* rule must be held to violate the privilege

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<sup>60</sup> Authorities recognizing the constitutional status of the presumption of innocence go back to *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 328 (1866). See also *United States v. Romano*, 382 U.S. 136, 139-44 (1965) (presence at still does not justify inference that accused possesses or controls the still); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958); *Morissette v. United States*, 342 U.S. 246, 274-75 (1952); *Morrison v. California*, 291 U.S. 82 (1934).

against self-incrimination. In *Leary*, registration and payment under the Marihuana Tax Act "compelled [an accused] to expose himself to a 'real and appreciable' risk of self-incrimination . . . ." 395 U.S. at 16. Such registration "would surely prove a significant 'link in a chain' of evidence tending to establish . . . guilt." *Marchetti v. United States*, 390 U.S. 39, 48 (1968).

So it is with the *Williams* rule. If the physician comes forward with evidence that the abortion was necessary for "health" reasons, he must perforce admit presence at the scene, and performance of the very act charged in the indictment. His own testimony will suffice to corroborate the first element of the offense, namely, that he performed the abortion. Not only will his own testimony provide a "link" in the chain, it may provide both links to a two-link chain, that is, the entire chain. He will have admitted performing the abortion, and the jury may not believe his reasons for justification. Accordingly, a weak prosecution case may be fortified and proved from the physician's own testimony. Since *Williams* requires that testimony, the District of Columbia rule on burden of proof, or burden of persuasion, invades the physician's privilege against self-incrimination. Under *Leary*, and earlier supporting decisions,<sup>51</sup> this is not permissible.

<sup>51</sup> See, e.g., *Haynes v. United States*, 390 U.S. 85 (1968).

## VI.

**D.C. Code §22-201 Deprives Physicians and Their Patients of Rights Protected by the First, Fourth, Fifth, and Ninth Amendments, and Is Void by Reason of Overbreadth, Because Neither Narrowly Drawn Nor Supported by Any Compelling or Legitimate Governmental Interests.**

Not only does Appellee challenge the vagueness of the statute, but also its substantive validity under the First, Fifth, and other amendments to the United States Constitution. This Court may hold that the statute is not uncertain and that it bears one or another construction which will sustain it. However, it is most unlikely that the statute, as written and re-enacted, can be construed to permit an abortion, in clinical surroundings, of a woman in good "health," who has had contraceptive failure, or did not for some reason utilize contraceptives. Such a woman is the individual whose request for an abortion, in the very early stages of pregnancy, is most frequent.

Even assuming that this Court enjoins the statute for vagueness, the further question of overbreadth should be reached and decided. This has been the practice of the Court in a wide variety of cases, particularly where freedom of association<sup>22</sup> was at issue, as it is here. "[It] would furnish a definitive ruling on a point of federal law for . . . future guidance . . ." <sup>23</sup> of the parties. A final "definitive ruling" on the federal questions raised hereinafter would

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<sup>22</sup> See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963).

<sup>23</sup> *LSCREC v. Wadmond*, 299 F. Supp. 117, 123 (S.D.N.Y. 1969) (Friendly, J.).



avoid costs and delay, prevent continued litigation on the substantive issues, and conserve judicial time and resources.

Ultimately, the question presented is whether a State may enact a felony statute to punish a physician, a woman, and her husband, with up to ten years in federal prison, where the couple requests, and the physician performs, a therapeutic surgical procedure to abort a pregnancy which the couple did not want, but were unable to prevent. Under *Griswold v. Connecticut*, 381 U.S. 479 (1965), it is clear that a husband and wife<sup>44</sup> are constitutionally privileged to control the size and spacing of their family by contraception. The failure of contraception, however, is commonplace.<sup>45</sup> Authoritative estimates are that between 750,000

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<sup>44</sup> *Griswold* was silent on the significant problem of access by unmarried persons to contraceptives. A result of non-access, and failure, is the birth of over 100,000 illegitimate children yearly to girls age nineteen or younger. See U.S. BUREAU OF THE CENSUS: *Statistical Abstract of the United States: 1969*, Table 59, at 50 (90th ed. 1969).

Outside of the state judiciary in Massachusetts, authorities have uniformly held the *Griswold* rationale applicable to litigants who had not entered into the marriage contract. Compare *Baird v. Eisenstadt*, — F.2d —, No. 7578 (1st Cir. July 6, 1970) (invalidating Massachusetts statute which outlawed distribution of contraceptives to the unmarried), *Mindel v. United States Civil Service Comm'n*, 312 F. Supp. 485 (N.D. Calif. 1970) (reinstating postal clerk who had been dismissed for cohabitation without benefit of marriage), and *Roe v. Wade*, — F. Supp. —, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam) (Texas anti-abortion statutes "deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."), with *Sturgis v. Attorney General*, 260 N.E. 2d 687, 690 (Mass. 1970) (directly contrary to federal decision in *Baird*).

<sup>45</sup> If a married couple is to have private control over numbers and spacing of children, induced abortion is absolutely necessary as a backstop to contraceptive failure. For compilation of contraceptive failure rates according to method used, see P. EHRlich & A. EHRlich, *POPULATION RESOURCES ENVIRONMENT* 218-19 & Table

and 1,000,000 births each year are unwanted.<sup>56</sup> These are in addition to the 200,000 to 1,000,000 unwanted pregnancies which are estimated to end in abortions induced outside of the clinical setting.<sup>57</sup> Taken together, some 950,000 to 2,000,000 unwanted births plus non-clinical abortions occur yearly. Accordingly, one must conclude that restrictive anti-abortion statutes, such as the District of Columbia law in question here, drastically affect the conduct of literally millions of American citizens.

The national significance of the issues in this case can also be inferred from increased activity within the medical profession, and in the legislatures. On June 25, 1970, the House of Delegates of the American Medical Association voted to permit licensed physicians to perform abortions in hospitals, with the sole additional qualification that two other physicians be consulted.<sup>58</sup> Physicians were cautioned,

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9-1 (1970); N. EASTMAN & L. HELLMAN, *WILLIAMS OBSTETRICS* 1068-75 (13th ed. 1966); Hardin, *History and Future of Birth Control*, 10 *PERSPECTIVES IN BIOLOGY & MED.* 1, 7-13 (1966); Tietze, *Clinical Effectiveness of Contraceptive Methods*, 78 *AM. J. OBST. & GYNEC.* 650 (1959).

<sup>56</sup> The most recent scholarly examination of unwanted birth magnitudes will appear in a forthcoming issue of *SCIENCE*. A summary of these findings by Dr. Charles F. Westoff of Princeton University's Office of Population Research, analyzing the 1965 National Fertility Study, appeared in the *N.Y. Times*, Oct. 29, 1969, at 25, col. 3.

<sup>57</sup> Secret induced abortions are inherently incapable of quantification. Nonetheless, one can be certain that the number is very high. For estimates, see Fisher, *Criminal Abortion*, in *ABORTION IN AMERICA* 3-6 (H. Rosen ed. 1967); M. CALDERONE (ed.), *ABORTION IN THE UNITED STATES* 180 (1958); P. GEBHARD *et al.*, *PREGNANCY, BIRTH AND ABORTION* 136-37 (1958); F. TAUSSIG, *ABORTION: SPONTANEOUS AND INDUCED* 25 (1936); Regine, *A Study of Pregnancy Wastage*, 13 *MILBANK MEM. FUND QUART.* No. 4, at 347-65 (1935).

<sup>58</sup> See *N.Y. Times*, June 26, 1970, at 1, col. 1. The statement has not yet been published in an official A.M.A. document. A recent

however, not to violate existing state statutes, forty-seven of which are far more restrictive." Three states in 1970—New York, Alaska, and Hawaii—removed, for the most part, any criminal penalties which might previously have been imposed upon physicians for performing abortions in appropriate medical facilities.<sup>60</sup> From 1967 to 1970, twelve states had adopted therapeutic abortion statutes similar to that of the Model Penal Code's 1962 Proposed Official Draft.<sup>61</sup> More recently, on August 4, the Commissioners on Uniform State Laws issued a Second Tentative Draft of a UNIFORM ABORTION ACT. The Act sanctioned abortions by licensed physicians "within 24 weeks after the commencement of the pregnancy; or if after 24 weeks . . ." under the circumstances set out in the Model Penal Code proposal.

These developments bear witness to the importance of the issues presented here.

While policy-making and legislative bodies have debated the issue of abortion, courts, confined to the constitutional framework, have been asked to resolve the questions of individual privacy and legislative power which are pre-

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issue of the J.A.M.A. noted that only 26 physicians had resigned from the body because of new policy. 213 J.A.M.A. 1242 (Aug. 24, 1970).

<sup>60</sup> For analysis of abortion laws in the United States prior to the most recent changes, see Lucas, *Laws of the United States*, in I ABORTION IN A CHANGING WORLD 127 (R. Hall ed. 1970); George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371 (1966).

<sup>61</sup> See, e.g. [1970], N.Y. Laws ch. 127, at 170, amending N.Y. PENAL LAW §125.05(3) (McKinney 1967).

<sup>62</sup> See MODEL PENAL CODE §230.3(2) (Proposed Official Draft, 1962). The states are Arkansas, California, Colorado, Delaware, Georgia, Kansas, New Mexico, North Carolina, Oregon, South Carolina, and Virginia.

sented here. Although the questions framed in this case have not been decided by this Court, numerous federal and state decisions attest to the validity of the federal constitutional rights asserted here. Moreover, the sometimes sharp divisions in the courts below illustrate further the need for a decision at this level.

#### **A. The Rights to Give and Receive Medical Advice and Treatment**

The present action has First Amendment implications, namely the right of the physician to provide medical information, followed by treatment, for his patients, and the right of the patient to receive same. The right of a competent licensed physician to give medical advice can be characterized as free expression alone,<sup>32</sup> or when viewed as

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<sup>32</sup> Similarly, it is an aspect of the physician's general liberty under the Fifth Amendment to practice his chosen profession free from unconstitutional restraint. See *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102-03 (1963); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Birnbaum v. Trussell*, 371 F.2d 672 (2d Cir. 1966); see also *United States v. Freund*, 290 Fed. 411 (D. Mont. 1923), invalidating a Prohibition act which restricted the amount of alcohol a physician could prescribe:

"It is an extravagant and unreasonable attempt to subordinate the judgment of the attending physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice."

With respect to the prescription of contraceptives, moreover, physicians received considerable protection in many early cases to the point that the various Comstock acts took the path of demerit. See, e.g., *United States v. Nicholas*, 97 F.2d 510 (2d Cir. 1938) (L. Hand, J.); *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936) (A. Hand, J.); *Youngs Rubber Corp. v. C. I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930) (Swan, J.).

an aspect of the physician-patient relationship, it becomes part of the freedom of association between physician and patient. The First Amendment has long been held to accord presumptive protection for the "freedom to associate and privacy in one's associations." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). This has been the case with the marital relationship,<sup>33</sup> and that of attorney and client.<sup>34</sup> The relationship between physician and patient is no different; it promotes the fundamental purpose of maintaining the health and well-being of the American people.

The advice aspect of medical practice is but one part of Appellee's claim, for medical treatment involving interruption of the unwanted pregnancy may be what the patient ultimately requests, and the criminal statute proscribes.

"[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest . . . must appear. . . ."

*United States v. O'Brien*, 391 U.S. 367, 376 (1968).

The nature of this interest has been described by a "variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." 391 U.S. at 376-77 (citations omitted).

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<sup>33</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), describing the "marriage relationship" as

"an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

<sup>34</sup> See *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railway Trainmen v. Virginia*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar*, 389 U.S. 217 (1967).

Before discussing the possible State interests which have been offered to compel a woman to bear and raise children against her will, Appellee will examine various other rights of constitutional dimension which the challenged statutes curtail.

### **B. The Rights of Marital and Personal Privacy**

The antecedents and progeny of *Griswold v. Connecticut*, 381 U.S. 479 (1965), offer generalized support for applying a presumptive constitutional right of privacy to encompass the right of a woman to have an abortion, in the early stages of pregnancy, when contraception failed or was not used.

*Griswold* is not an isolated decision confined to its facts, but is one in a continuing line of cases involving various aspects of personal privacy and family autonomy.<sup>66</sup> Most recently this Court recognized a "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (Marshall, J.). Indeed, the *Stanley* case is of special importance, for there a majority of the Court embraced with approval the very significant language from Mr. Justice Brandeis' dissent in *Olmstead v. United States*:

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<sup>66</sup> Commentary on the *Griswold* case has been extensive. Particularly noteworthy materials include: Kelly, *Clio and the Court: An Illicit Love Affair* [1965] SUP. CT. REV. 119; Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34 (1967); Pilpel, *Birth Control and a New Birth of Freedom*, 27 OHIO ST. L.J. 679 (1966); Franklin, *The Ninth Amendment*, 40 TUL. L. REV. 487 (1966); Beane, *The Griswold Case and the Expanding Right to Privacy*, 1966 WM. L. REV. 979; Symposium—*Comments on the Griswold Case*, 64 MICH. L. REV. 197 (1965); Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966); Note, *The Supreme Court—1964 Term*, 79 HARV. L. REV. 56, 162-65 (1965).

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." 277 U.S. at 478.

*Olmstead's* dissent was also quoted with approval by Burger, Circuit Judge, in *Application of the President and Directors of Georgetown College, Inc.*, 331 F.2d 1010, 1016-17 (D.C. Cir.) (*en banc*) (dissenting opinion), *cert. denied*, 377 U.S. 978 (1964).

The District of Columbia abortion law, if strictly construed, gives little consideration to a woman's feelings, pains, thoughts, and emotions. It impinges severely upon her dignity, her life plan, and her marital relationship if she has one. It is a first order invasion of her privacy with irreparable consequences.

Retired Justice Tom C. Clark has suggested that the concept of privacy should include control over family planning beyond the stage of contraception. He wrote:

"[A]bortion falls within that sensitive area of privacy—the marital relation. One of the basic values of this privacy is birth control, as evidenced by the *Griswold* decision. *Griswold's* act was to prevent formation of the fetus. This, the Court found, was constitutionally protected. If an individual may prevent conception,



why can he not nullify that conception when prevention has failed?"<sup>44</sup>

The protection of various rights in the marital and family context has firm origins in decisions dating back over fifty years.

A first and recent example, *Loving v. Commonwealth*, 388 U.S. 1, 12 (1967) (alternate ground of decision), specifically held that the due process clause of the Fourteenth Amendment protects "[t]he freedom to marry . . . as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving* stands for the proposition that "the right to marry" is protected by the due process clause although not specifically mentioned in the Bill of Rights. The decision must lend further support to arguments that other important interests associated with marriage and the family are protected from arbitrary government intrusion.

Associated with the right to marry is the right to raise children, if one chooses, without arbitrary governmental interference. A unanimous Court indeed has held that "the right to have offspring" is a constitutionally protected "human right" which cannot be taken away by a discriminatory statute requiring the sterilization of some persons convicted of crime, but not of others similarly situated. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942). Again, the right to have offspring is not mentioned in the Bill of Rights. However, the *Skinner* Court, composed of Justices Douglas (author of the opinion), Black, Reed, Frankfurter, Murphy, Byrnes, Roberts, Jackson, and Chief Justice Harlan Fiske Stone (the latter two wrote concurring opinions)

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<sup>44</sup> Clark, *supra* note 34, at 9.



had no difficulty holding that this right was protected by the Constitution. Moreover, these members of the Court had all disassociated themselves from the economic substantive due process school of thought found in the much criticized and overruled opinion of *Lochner v. New York*, 198 U.S. 45 (1905).

Assuming, then, that the right to have offspring enjoys a constitutional presumption of protection, should not a right *not* to have offspring be of equal stature under the Constitution?

Further cases upholding rights associated with the family include *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), both of which were subsequently reaffirmed in *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965). A unanimous Court in *Pierce* recognized a right to send one's children to private school. This right was derived from "the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35. The *Pierce* Court, moreover, included Justices who rejected the economic due process formula of *Lochner*, namely Justices Brandeis, Holmes, and Stone. On the basis of *Pierce*, is it not reasonable to argue that parents also should have a right to determine how many children whose "upbringing and education" they will direct? Not dissimilar to *Pierce* was *Meyer*, a 7-2 decision invalidating a State statute which prohibited the teaching of German to pupils below the eighth grade. The *Meyer* Court found that the due process clause included "the right . . . to marry, establish a home and bring up children." 262 U.S. at 399. Again, the decision is not objectionable as a manifestation of economic due process because it was joined by Justice Bran-

deis, among others, who rejected the *Lochner* scheme. The dissents, moreover, by Justices Holmes and Sutherland, rested on the assumption that the State had a substantial interest in assuring that foreign-born students and students of alien parentage had considerable training in the English language before being exposed to other languages.

Taken together, the *Griswold*, *Stanley*, *Loving*, *Skinner*, *Pierce*, and *Meyer* decisions all illustrate that the Constitution protects certain privacy and family interests from government intrusion unless a compelling substantial justification exists for the legislation.<sup>67</sup> Appellee contends that the right of a patient to determine whether to have additional children, and if not then to terminate a pregnancy in its early stages, is such a right, fully entitled to protection in the setting of this case.

### **C. *The Right of a Woman to Choose Whether and When to Bear and Raise Children***

In addition to the decisions upholding rights associated with personal and family privacy, an overlapping body of precedent extends significant constitutional protection to the citizen's sovereignty over his or her own body.

As early as 1891 this Court stated:

"No right is held more sacred, [n]or is more carefully guarded . . . than the right of every individual to the

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<sup>67</sup> See also *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Mr. Justice Harlan, dissenting):

"[T]he integrity of [family] life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

possession and control of his own person, free from all restraint or interference of others unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.' " *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891), quoted in *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968).

This right, like all rights, has limits, as illustrated by *Jacobson v. Massachusetts*, 197 U.S. 11 (1904). There this Court upheld a compulsory vaccination law, but only to avoid "great dangers" and to protect "the safety of the general public." 197 U.S. at 29. The lengths to which the Court went, however, to justify a shot in the arm point up the degree to which personal autonomy is entitled to protection.

In marital and family matters relating to procreation, this Court has consistently recognized and sustained the individual's rights, and has done so on a constitutional plane. "The freedom to marry . . .," *Loving v. Commonwealth*, 388 U.S. 1, 12 (1967); "the right to have offspring," *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942); and "the liberty of parents and guardians to direct the upbringing and education of children under their control," *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), are all protected constitutional rights, embedded in American law, as is the right, at least of a married woman, to use contraceptives.

These rights, however, do not complete the set. Without a right to respond, a woman is at the mercy of possible contraceptive failure, particularly if she is unable or unwilling to utilize the most effective contraceptives. When

pregnancy begins, she is faced with a governmental mandate compelling her to serve as an incubator for months, and finally as an ostensibly willing mother for up to twenty or more years. Often she must forego a career or further education, and endure economic and social hardships. Under the present law she is given no other choice. Without the right to obviate contraceptive failure, other rights of privacy or family rights would be largely diluted. Continued pregnancy is compulsory, unless she can persuade the authorities that she is potentially suicidal, or that her "health" is otherwise endangered.

***D. The Fifth Amendment Due Process Right of a Presently "Healthy" Woman to Equal Access to a Therapeutic Abortion on the Same Terms as a Presently "Unhealthy" Woman***

A third interest of constitutional dimension infringed by the District anti-abortion statute is the "healthy" woman's interest in having access to abortion on the same terms as an "unhealthy" woman. Putting to one side the ambiguity of the "health" concept, the statute divides abortion applicants into two groups, the "healthy," and "unhealthy." The latter group may obtain a legal abortion without sanction, if they can find physicians willing to risk the possibility of prosecutorial abuse of the statute's vague terms. The "healthy" woman, however, whose "health" would not be damaged by continued pregnancy, is excluded. In spite of her and/or her husband's desire to postpone pregnancy, or not to have further children, she may not obtain a legal abortion without risking her physician's liberty and professional license. Indeed, while she is not personally liable, her husband and other family members who assist in arranging the abortion may be guilty as accomplices.

Although the Fifth Amendment has no specific equal protection clause, this Court has frequently held that similar standards apply to scrutiny of invidious discriminations under the due process clause of that Amendment. This is the necessary teaching of cases such as *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969); and *Bolling v. Sharpe*, 347 U.S. 497 (1954). "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider v. Rusk*, 377 U.S. 163, 168 (1964). Compare *Shapiro v. Thompson*, *supra*, 394 U.S. at 663 (Harlan, J., dissenting) (discussion of "the Equal Protection Clause of the Fourteenth Amendment [and] the analogous standard embodied in the Due Process Clause of the Fifth Amendment.").

This due process prohibition against invidious discriminations that lack rational justification is relevant here. As the analysis, *infra*, of possible governmental interests behind the abortion statute will show, the discrimination in the present case cannot be squared with the due process clause on any theory.

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Numerous decisions by lower courts, in both the federal and state systems, bear witness that the rights asserted here are of constitutional dimension, and may be recognized by straightforward application of traditional constitutional principles.

In late September, 1969, the Supreme Court of California became the first appellate court to recognize the constitutional stature of a "fundamental right of the woman to choose whether to bear children . . . ." <sup>44</sup> The *Belous*

<sup>44</sup> *California v. Belous*, 71 Cal. 2d —, —, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), *cert. denied*, 397 U.S. 915 (1970).

court found this right implicit in this Court's "repeated acknowledgment of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." "

More recently, three different decisions by statutory three-judge federal courts have invalidated restrictions on access to medical abortion in Wisconsin, Texas, and Georgia. The first, *McCann v. Babbitz*,<sup>10</sup> recognized in that jurisdiction a woman's

"basic right reserved to her under the ninth amendment to decide whether she should carry or reject an embryo which has not yet quickened." 310 F. Supp. at 302.

*McCann* grew out of the prosecution of a physician, but the three-judge court had no difficulty holding that a

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*Belous*, a state court appeal of a conspiracy conviction of a physician, involved a statute similar to that in the present case.

One year earlier, a California trial court had ruled that the Eighth and Fourteenth Amendments prohibited license revocation proceedings against physicians who had performed hospital approved abortions on patients exposed in early pregnancy to German measles. The opinion of the trial court, however, simply enumerated those Amendments among various conclusions of law, without supporting the conclusions with any attempt at reasoned analysis. Nonetheless, the result is of interest. See *Shively v. Board of Medical Examiners*, No. 590333 (Calif. Super. Ct., San Fran. County Sept. 24, 1968) (not reported), on remand from 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1968) (granting physicians' motions for discovery, without reference to merits).

<sup>10</sup> 71 Cal. 2d at —, 458 P.2d at 199, 80 Cal. Rptr. at 359, citing, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536 (1942).

<sup>11</sup> 310 F. Supp. 293 (E.D. Wis. 1970) (per curiam), appeal docketed, 38 U.S.L.W. 3524 (U.S. June 20, 1970) (No. 297, Oct. 1970 Term).

physician has standing to assert the rights of pregnant patients."<sup>1</sup>

The second recent federal decision, *Roe v. Wade*,<sup>2</sup> declared the Texas anti-abortion statutes unconstitutional on the similar ground that

"they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children."

A third federal decision, *Doe v. Bolton*,<sup>3</sup> followed *Belous*, *McCann*, and *Roe*, holding:

"[T]he concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy.

"... [T]he reasons for an abortion may not be proscribed...."

Numerous lower courts have followed this lead, in both federal and state disputes.<sup>4</sup> In addition, three-judge courts

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<sup>1</sup> The standing of a physician to assert a patient's rights along with his own follows from *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965), and *Barrows v. Jackson*, 346 U.S. 249, 257 (1953). On this standing point, lower court decisions involving abortion laws all agree. See also *Planned Parenthood Ass'n of Phoenix v. Nelson*, Civ. No. 70-334 PHX (D. Ariz. Aug. 24, 1970) (per curiam); *Doe v. Bolton*, — F. Supp. —, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam); *Roe v. Wade*, — F. Supp. —, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam); *United States ex rel. Williams v. Follette*, 313 F. Supp. 269, 273 (S.D.N.Y. May 12, 1970).

<sup>2</sup> — F. Supp. —, Civ. No. 3-3690-B (N.D. Tex. June 17, 1970) (per curiam).

<sup>3</sup> — F. Supp. —, Civ. No. 13676 (N.D. Ga. July 31, 1970) (per curiam).

<sup>4</sup> See, e.g., *State v. Munson* (S.D. 7th Jud. Cir., Pennington County Apr. 6, 1970) (Clarence P. Cooper, J.) (recognizing the woman's "'private decision whether to bear her unquickened child'"); *State v. Ketchum* (Mich. Dist. Ct. Mar. 30, 1970) (Reid,



have been convened in a number of states to consider actions quite similar to that presented here.<sup>15</sup>

***The Distinction Between Personal and Economic Rights Under the Due Process Clause and the Relevance of the Ninth Amendment as an Aid to Construction***

Appellee's position is by no means an assertion that courts ought "to roam at large in the broad expanses of policy and morals,"<sup>16</sup> nor that this Court should "sit as a super-legislature to weigh the wisdom of legislation nor to

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J.) ("the statute as written infringes on the right of privacy in the physician-patient relationship, and may violate the patient's right to safe and adequate medical advice and treatment."); *Commonwealth v. Page*, Centre County Leg. J. at 285 (Pa. Ct. Comm. Pl., Centre County July 23, 1970) (Campbell, P.J.) ("the abortion statute interferes with the individual's private right to have or not to have children."); *People v. Gwynne*, No. 176601 (Calif. Mun. Ct., Orange County Aug. 13, 1970) (Schwab, J.); *People v. Gwynne*, No. 173309 (Calif. Mun. Ct., Orange County June 16, 1970) (Thomson, J.); *People v. Barksdale*, No. 33237C (Calif. Mun. Ct., Alameda County Mar. 24, 1970) (Foley, J.); *People v. Robb*, Nos. 149005 & 159061 (Calif. Mun. Ct., Orange County Jan. 9, 1970) (Mast, J.); cf. *United States v. Vuitich*, 305 F. Supp. 1032 (D.D.C. 1969), *ques. of juris. postponed to merits*, 397 U.S. 1061, *further juris. questions propounded*, 399 U.S. 923 (1970); *United States ex rel. Williams v. Follette*, 313 F. Supp. 269, 272-73 (S.D.N.Y. 1970) (questions substantial, but habeas petitioner-physician remitted to state courts).

<sup>15</sup> See, e.g., *Gwynne v. Hicks*, Civ. No. 70-1088-CC (C.D. Calif., filed May 18, 1970); *Arnold v. Sendak*, IP 70-C-217 (S.D. Ind., filed Mar. 29, 1970); *Corkey v. Edwards*, Civ. No. 2665 (W.D.N.C., filed May 12, 1970); *YWCA of Princeton v. Kugler*, Civ. No. 264-70 (D.N.J., filed Mar. 5, 1970); *Hall v. Leskowitz*, 305 F. Supp. 1030 (S.D.N.Y. 1969), *dismissed as moot* Op. No. 36936 (S.D.N.Y. July 1, 1970) (*per curiam*) (statute repealed); *Benson v. Johnson*, Civ. No. 70-226 (D. Ore., filed Aug. 4, 1970).

<sup>16</sup> *Adamson v. California*, 332 U.S. 46, 90 (1947) (dissenting opinion of Mr. Justice Black). See also *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting); *id.* at 527 (Stewart, J., dissenting); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).



decide whether the policy which it expresses offends the public welfare." " Here, as in *Griswold*, the position is that there are certain sacred rights associated with individual privacy and the marital relation. These rights have already been held to include the rights to marry, have children, not have children (by use of contraceptives), and raise children. Appellee claims that these rights also include the right not to have children in the case where pregnancy can be terminated in its early stages by means of an induced or therapeutic abortion. This is by no means a novel claim in light of the lines of decision discussed above.

Two distinctions can be made which limit the scope of the principle asserted: first, that there are constitutional justifications for treating "personal" rights differently from purely "economic" rights in cases arising under the due process clause, and second, that there are even weightier considerations for treating "privacy" and "marital" rights with great solicitude in order to protect these most important areas from legislative experimentation. *Griswold* recognized these distinctions. Writing for the majority Mr. Justice Douglas reaffirmed the proposition that the Court does not

"sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions." 381 U.S. at 482.

However, the Court recognized an important distinction where the challenged statute

"operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." 381 U.S. at 482.

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"*Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

That is precisely the type of situation presented by this case, and the kind of circumstance envisioned by the concurring opinion in *Griswold* by Mr. Justice Goldberg:

"I quite agree with Mr. Justice Brandeis that . . . 'a . . . State may . . . serve as a laboratory; and try novel social and economic experiments . . . ' I do not believe that this includes the power to experiment with the fundamental liberties of citizens . . . ." 381 U.S. at 496.

It is apparent, moreover, that Justices Holmes, Brandeis, Stone, Jackson, Frankfurter, and Reed also took this position. They consistently rejected an economic due process approach, but joined in due process opinions which protected fundamental "personal" liberties. These have already been discussed at length.

In addition, there are more recent expressions which indicate a different standard for testing "legislation [which] touches upon fundamental individual and personal rights essential to maintaining the independence, integrity, and private development of a citizen in a highly organized, yet democratic society."<sup>18</sup> The several "right to travel" cases recognized a right which is nowhere spelled out in the Constitution or Bill of Rights,<sup>19</sup> as do decisions which

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<sup>18</sup> Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 224 (1965). Professor Emerson suggests that this "distinction is . . . a fundamental one," *id.*, and analyzes cases which can be explained on such a basis. *E.g.*, *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

<sup>19</sup> *E.g.*, *Aptheker*, *supra*; *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Laub*, 385 U.S. 475 (1967); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Lynd v. Rusk*, 389 F.2d 940 (D.C. Cir. 1967); *see United States v. Guest*, 383 U.S. 745, 757-59 (1966) (Stewart, J.):

(footnote continued on next page)

broadly protect freedom of "association" far beyond the mere articulation of ideas and into the sphere of organized action." A majority of this Court last Term, in a case concerning allocation of government economic benefits among applicants with diverse needs, recognized the continuing validity of this distinction. A distinction was drawn between "state regulation in the social and economic field," and that "affecting freedoms guaranteed by the Bill of Rights . . . ." *Dandridge v. Williams*, 397 U.S. 471, 484 (1970). In *Dandridge*, the Court divided as to which standard and which characterization should apply. In the present case, there is no room for difference. The conflict here involves state interference in wholly private behavior. Moreover, the behavior intimately concerns the family, and the highly personal decision of a woman as to whether she should assume the life-long responsibilities that inhere in allowing a newly-begun pregnancy to continue.

Principled justification exists for making this distinction.<sup>41</sup> The Constitution grants plenary power to the legislative branch to regulate commerce and to levy taxes for

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"The Constitutional right to travel . . . occupies a position fundamental to the concept of our Federal Union. . . . [T]hat right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be . . . necessary . . . . All have agreed that the right exists."

<sup>41</sup> See, e.g., *United Mine Workers v. Illinois State Bar*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

<sup>42</sup> The personal-economic dichotomy is also suggested in *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring); Bostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 215-24 (1952); cf. Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 371-73 (1949) (similar dichotomy suggested for equal protection setting).

the general welfare. It grants no such power to the courts for appraising economic legislation. On the other hand, the Constitution grants considerable power to the courts for the purpose of protecting certain basic human rights. And, the Constitution grants no such power to the legislative branch for the purpose of experimenting with basic human rights because these rights are to be protected rather than subjected to legislative regulation. It follows, therefore, in light of the due process clause and the Ninth Amendment (discussed below), that the judiciary is charged with the protection of those rights in the Bill of Rights and other non-economic fundamental rights which have not been enumerated, such as those associated with the family, particularly where *federal* governmental action is present, as here.

Significantly, the text of the Constitution does not prohibit the courts from protecting basic human rights which are not enumerated. The draftsmen of the Bill of Rights could certainly have used language to limit the courts to protecting only those rights which were specifically named. The very opposite was done, however, by the expansive language of "rights" "not enumerated," "privileges and immunities," and "due process of law." These latter terms, moreover, were written against the background of Chief Justice Marshall's statement in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), that:

"We must never forget that it is a Constitution we are expounding . . . intended to endure for ages to come, and consequently to be adapted to the various crises in human affairs."

Similarly, Mr. Justice Brandeis wrote:

"Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world . . . . The progress of science in furnishing the Government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the Government . . . will be enabled to expose to a jury the most intimate occurrences of the home . . . . Can it be that the Constitution affords no protection against such invasions of individual security?"

*Olmstead v. United States*, 277 U.S. 438, 472, 474 (1928) (dissenting opinion).

Finally, what was said by Mr. Justice Stewart in a post-*Griswold* decision may be aptly paraphrased to apply in the present context:

"The Constitutional right [of marital privacy] . . . occupies a position fundamental to the concept of our Federal Union. \* \* \* [T]hat right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be . . . necessary . . . ."

*United States v. Guest*, 383 U.S. 745, 757-58 (1966). Can it be that a right of marital privacy, or personal privacy or autonomy, occupies a lesser position than a right to travel from state to state?

One basic purpose of the first nine amendments could not have been to render the courts helpless in the face of government intrusion upon personal and marital privacy. What has been said concerning the due process clause and the distinction between personal and economic rights finds

further support in the Ninth Amendment, as recognized in the *Griswold* concurrence by Mr. Justice Goldberg, Chief Justice Warren, and Justice Brennan.<sup>82</sup>

Justice Goldberg summarized his interpretation of the Ninth Amendment as follows:<sup>83</sup>

"I do not mean to imply that the Ninth Amendment is applied against the State by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the State or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated and an intent that the list of rights included there not be deemed exhaustive." 381 U.S. at 492.

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<sup>82</sup> Post- and pre-*Griswold* discussions of the Ninth Amendment have surveyed its history in the convention and the courts. They point to the accuracy of Mr. Justice Goldberg's interpretation, as contrasted with that of the dissents. See generally Note, *The Uncertain Renaissance of the Ninth Amendment*, 33 U. CHI. L. REV. 814 (1966); Franklin, *The Ninth Amendment*, 40 TUL. L. REV. 487 (1966); *Symposium—Comments on the Griswold Case*, 64 MICH. L. REV. 197, 207, 227-28, 254-55, 268-71 (1965); Redlich, *Are There "Certain Rights . . . Retained by the People?"*, 37 N.Y.U. L. REV. 787 (1962).

<sup>83</sup> The Note cited above, 33 U. CHI. L. REV. at 825, reaches the same conclusion after an exhaustive study of the Ninth Amendment:

"In summary, whether one reads the history of the ninth as foreclosing the 'imperfect enumeration' theory, or as attempting to avoid future definitional problems, the amendment clearly remains a rule of construction with the purpose of obviating the possibility of interpreting the first eight amendments as exclusive. It is not, as its history indicates, either a source or a summary of those unenumerated rights."

No specific constitutional provision covers the rights to marry, raise children, travel, attend private school, to dress as one chooses, to pursue one's chosen profession, or a host of rights which might someday be invaded by legislatures. The framers could hardly be expected to undertake the herculean task of listing all personal rights which might be regarded as of equal stature to those more specifically spelled out. Therefore, it appears, they enacted the Ninth Amendment.

Recognition of the rights being asserted on this appeal would not usher in a vast increase in judicial power. What has been said pertaining to *Griswold* applies here:

"*Griswold v. Connecticut* is a reaffirmation of a power long exercised by the Court in protecting fundamental rights. It required no judicial roving at large to reach the conclusion that the freedom of the marital relationship is a part of the bundle of rights associated with home, family, and marriage—rights supported by precedent, history, and common understanding. For a court to find that these rights are fundamental, whether because they are deeply written in the tradition and conscience of our people, are part of the concept of ordered liberty, are implicit in the notion of a free society, or emanate from the totality of the constitutional order, involves no immodest or startling exercise of judicial power. The decision operates within a narrow sphere. In exercising its power in *Griswold* to protect a fundamental personal liberty, the Court, far from advancing to a new milepost on the high road to judicial supremacy, was treading a worn and familiar path.



Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 44 MICH. L. REV. 235, 258 (1965). And, as Professor Sutherland suggested, "[i]f anyone rebels at the thought of entrusting this power to the nine Justices, he may well consider for a little while to whom he would prefer to entrust it; this can be a sobering experience." Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283, 288 (1965).

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Accepting, then, that Appellee, physicians similarly situated, and their patients are rightfully asserting fundamental rights of constitutional dimension, it is necessary to evaluate the competing interests of the government.

Two governing principles must be satisfied to sustain this statute: Its provisions must be (1) narrowly drawn, and (2) supported by compelling governmental interests. As outlined in the majority and concurring opinions in *Griswold*:

"a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' *NAACP v. Alabama*, 377 U.S. 288, 307." 381 U.S. at 485.

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"In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing



a subordinating interest which is compelling.' *Bates v. Little Rock*, 361 U.S. 516, 524." 381 U.S. at 497 (concurring opinion of Goldberg, J.).

## **E. Insufficiency of Governmental Interests**

### **1. Interests discernible from legislative and common law history**

Specific legislative history setting out the rationale behind the challenged statute, what the measure sought to achieve, why, and how, is not available. The current statute, D.C. CODE §22-201, is derived from D.C. CODE §809, 31 Stat. 1322 (1901), which until 1951 provided a lesser penalty for the identical offense described in the current statute. The 1901 statute superseded, but was not necessarily derived from an 1872 Act of the Territorial Legislative Assembly.<sup>44</sup> The latter appears to have been derived from an 1868 Maryland statute,<sup>45</sup> and that from the common law.

At common law an abortion could be performed without any penalty prior to the period of pregnancy called "quickening," i.e., 16-18 weeks.<sup>46</sup> This principle was accepted in *Lamp v. Maryland*, 67 Md. 524, 10 Atl. 298 (1887) (quoting

<sup>44</sup> ARREST, COMPILED STATUTES IN FORCE IN THE DISTRICT OF COLUMBIA ch. XVII, §§13-15 (1894). Section 15 exempted from criminal sanction "any case of abortion produced or caused by regular physicians for the purpose of preserving the life of any woman pregnant . . . ."

<sup>45</sup> MD. CODE ANN. ch. 179, §2 (1868), exempted "the production of abortion by a regular practitioner of medicine when, after consulting with one or more respectable physicians, he shall be satisfied that the foetus is dead, or that no other method will secure the safety of the mother."

<sup>46</sup> See L. AREY, DEVELOPMENTAL ANATOMY 106-07 (Reference Table of correlated Human Development) (1965 ed.).

Lord Coke), and was the rule in the overwhelming majority of other jurisdictions." From 1828 onward, however, states began to modify the common law rule by legislation which prohibited all forms of abortion (other than spontaneous) at all stages of pregnancy." Maryland, in 1868, and the Territory of the District, in 1872, were among the first to follow suit.

Careful historical analysis" has shown that the new statutes had a medical purpose and were not designed to compel any particular moral view. Before the turn of the century all internal surgery was dangerous, for medical science, in its infancy, knew nothing about cleanliness. Sir

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" See *Hunter v. Wheate*, 53 App. D.C. 206 (D.C. Cir. 1923); *Smith v. Gaffard*, 31 Ala. 45 (1857); *Eggart v. Florida*, 40 Fla. 537, 25 So. 144 (1898); *State v. Alcorn*, 7 Idaho 599, 64 Pac. 1014 (1901); *Abrams v. Foshee*, 3 Iowa 274, 66 Am. Dec. 77 (1856); *Mitchell v. Commonwealth*, 78 Ky. 204, 39 Am. Rep. 227 (1879); *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607 (1851); *Commonwealth v. Bangs*, 9 Mass. 387 (1812); *Evans v. People*, 49 N.Y. 86 (1872); *Edwards v. State*, 79 Neb. 251, 112 N.W. 511 (1907); *State v. Cooper*, 22 N.J.L. (2 Zab.) 52, 51 Am. Dec. 248 (1849); *State v. Tippie*, 89 Ohio St. 35, 105 N.E. 75 (1913); *State v. Ousplund*, 86 Ore. 121, 167 Pac. 1019 (1917), *appeal dismissed per stip.*, 251 U.S. 563 (1919); *Gray v. State*, 77 Tex. Crim. 221, 178 S.W. 337 (1915); *Miller v. Bennet*, 190 Va. 162, 56 S.E.2d 217 (1949); *State v. Dickinson*, 41 Wis. 299 (1877). See generally Means, *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) [hereinafter Means]. Contrary decisions, based upon little or no historical research, are *Mills v. Commonwealth*, 13 Pa. St. 631 (1850); *Willis v. O'Brien*, 151 W.Va. 628, 153 S.E.2d 178, *cert. denied*, 389 U.S. 848 (1967); *State v. Slagle*, 83 N.C. 630 (1880).

" See, e.g., N.Y. REV. STAT., pt. IV, ch. 1, tit. 6, §§20-22 (1829); ILL. REV. CODE, §46 (1827); see generally George, *Current Abortion Laws: Proposals and Movements for Reform*, 17 W. RES. L. REV. 371 (1966); Lucas, *Laws of the United States*, in I ABORTION IN A CHANGING WORLD 127 (R. Hall ed. 1970).

" See Means, *supra* note 87 *passim*.

Joseph Lister's findings on antiseptic techniques were not printed until 1867, and did not gain acceptance in the major hospitals of the Eastern United States until nearly 1890.<sup>20</sup> Without such information and techniques (which we take for granted today), a simple doctor's office procedure—such as the opening of an abscess—could lead to serious infection and even death. Early court decisions on abortion fully recognized these medical facts.<sup>21</sup> It was recognized that the woman's interests were at stake, for all that she was as an adult human being, and everything that she meant to her family. Her actual interests were being protected in the 1800's from the dangers of surgery. She was the victim, not the criminal, and accordingly was never prosecuted.

Medicine changed rapidly after 1890, but the law was slow to follow suit. Originally the statutes were passed to protect the woman's life and health. Subsequently the same statutes, by prohibiting medical abortions, had the opposite

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<sup>20</sup> Lister's work was written up in an 1867 number of *The Lancet*. Earlier discoveries along the same lines had been made by Semmelweis and Oliver Wendell Holmes, Sr. See Holmes, *The Contagiousness of Puerperal Fever* (1843); I SEMMELWEIS, *THE AETIOLOGY, CONCEPT, AND PROPHYLAXIS OF CHILDBIRTH FEVER* (1861). See generally H. ROBB, *ASEPTIC SURGICAL TECHNIQUE WITH ESPECIAL REFERENCE TO GYNAECOLOGICAL OPERATIONS* (1875); C. HAAGENSEN & W. LLOYD, *A HUNDRED YEARS OF MEDICINE* (1943).

<sup>21</sup> See, e.g., *State v. Murphy*, 27 N.J.L. (3 Dutcher) 112, 114-15 (Sup. Ct. 1858):

"The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts . . . It is immaterial whether the foetus is destroyed, or whether it has quickened or not. . . ."

"The offense of third persons, under the statute, is mainly against her life and health. The statute regards her as the victim of crime, not as the criminal; as the object of protection, rather than of punishment." [Emphasis added.]

effect and forced a woman into the underground of non-medical abortion. Thus, throughout this century, non-medical abortion has been a major cause of maternal death, injury, infection, and sterility," for the simple reason that physicians would refuse to do medical abortions out of fear of prosecution.

Accordingly, the legal and medical history of abortion show at least one legitimate governmental concern, the protection of pregnant women from dangers then inherent in surgery. In fact, a statute was proposed in New York in 1828 which would have punished "any surgical operation . . . unless it appear that the same was necessary for the preservation of life . . . ." <sup>22</sup> This concern was echoed as late as 1943 in *Williams v. United States*, 78 U.S. App. D.C. 147, 150, 138 F.2d 81, 84 (1943) ("The dangers of abortion . . . come from . . . incompetent, unscrupulous practitioners, operating in secrecy, without antiseptic conditions. . . ."). *Williams*, however, was decided only a few years after curettage began to be used routinely in hospital treatment of incomplete abortions,<sup>24</sup> and at the same time that antibiotics came into use.<sup>25</sup>

In addition to concern with surgical dangers, the statute may have been an effort to enforce a brand of sexual

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<sup>22</sup> Early estimates were that non-medical abortions caused up to 10,000 deaths per year. See J. BATES & E. ZAWADZKI, *CRIMINAL ABORTION* 3-4 (1964). With the advent of antibiotics, however, 500-1000 is a more reliable estimate today. See Hall, *Commentary in ABORTION AND THE LAW* 228 (D. Smith ed. 1967).

<sup>23</sup> 6 N.Y. REVISERS' NOTES, pt. IV, ch. 1, tit. 6, §28, at 75 (1828).

<sup>24</sup> Douglas, *Toxic Effects of the Welch Bacillus in Postabortal Infections*, 56 N.Y. STATE J. MED. 3673 (1956).

<sup>25</sup> *Id.*

morality that considered reproduction as the only legitimate goal of sexual relations, and this, of course, only within the marital relationship. Thus, the *Williams* case expresses a disapproval of "[a]rguments that abortion should be permitted to avoid social disgrace or poverty or illegitimacy. . . ." 78 U.S. App. D.C. at 149.

Similarly, the common law and early decisions enforced a prohibition against abortions late in pregnancy, expressing the dual concern that late abortions posed increased hazard to the woman, and terminated the development of the foetus after signs of life had come into view. See *United States v. May*, 2 MacArthur (9 D.C.) 512 (1876). Nowhere, however, is there any historical basis for projecting any past or present legislative effort to equate the foetus or embryo in early pregnancy with a "person," as that term is used in the Constitution where citizenship depends upon birth or naturalization.

In light of this sparse legislative history, the final inquiry is whether the statute today is narrowly drawn to serve any compelling governmental interest. As Appellee has shown before, discussing vagueness, the statute on its face is far from narrowly drawn to meet any overt interest expressed in its ambiguous terminology.

## 2. The statute is not a rational public health measure in 1970

Whether the District's abortion statute, with its potentially drastic sweep, can be independently justified as promoting public health in 1970 is not even a close question. The statute clearly does not generate a more healthy female population. Rather, it creates "a public health problem of

pandemic proportions"<sup>66</sup> by denying to women the opportunity to obtain safe medical treatment in controlling their personal reproduction."<sup>67</sup>

As other courts, and all available medical studies have recognized, abortion under appropriate clinical surroundings is considerably safer—six or seven times—than ordinary childbirth.<sup>68</sup> Today abortion *per se* has no rational relationship to any medical hazards. It is only abortion in an unsanitary setting, or when undertaken by a non-physician, that is dangerous.<sup>69</sup> Yet, the statute is not so limited. It sweeps broadly to prevent a potentially all-inclusive class of pregnant women from obtaining abortions under any circumstances whatsoever. There is no carefully tailored effort to discern the optimum circumstances under which abortions are safest. Indeed, a 1933 statute could not be expected to have continued validity today when the health field has advanced beyond all ex-

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<sup>66</sup> Hall, *Abortion in American Hospitals*, 57 AM. J. PRA. HIGHS 1933, 1934 (1967).

<sup>67</sup> Some will contend that women themselves, not the statute, create their own public health quandries by refusing the reb of compulsory motherhood and seeking non-medical abortion as a last resort. But that is a bootstrap contention which the Government may not make. The statute itself must be said to create the health problems, for its very terms foreclose access to safe medical abortion in many if not most cases of pregnancy.

<sup>68</sup> See Tietze, *Mortality With Contraception and Induced Abortion*, 45 STUDIES IN FAMILY PLANNING 6 (Sept. 1969); *Babbitt v. McCann*, *supra*, 310 F. Supp. at 301; *California v. Belous*, 71 Cal.2d —, 458 P.2d 194, 200, 80 Cal. Rptr. 354, 360 (1969). The most comprehensive and recent data on the safety of medically induced abortions is set out in great detail in Tietze, *Abortion Laws and Abortion Practices in Europe*, EXCERPTA MEDICA INTERNATIONAL CONGRESS, Series No. 207 (Apr. 1969).

<sup>69</sup> See S. KLEEGMAN & S. KAUFMAN, *INFERTILITY IN WOMEN* 301 (1966), describing non-medical abortion as "one of the most important causes of subsequent infertility and pelvic disease."

pectations. In fact, it should be no surprise that a health measure of 1901 would have the opposite effect today, namely, that the statute itself creates health problems of great magnitude.

3. The statute is not rationally related to any legitimate governmental policy on control of human sexual behavior

To some extent, legislative history reflected a moral tone to the effect that sexual relations, in or out of marriage, ought to end in childbirth. An arguable corollary to this moral tone would be the condemnation of premarital sexual relationships, which tone assuredly prevailed around the turn of the century.

Some might even argue that sexual promiscuity will be curtailed by restricting abortion to the classes in the statute.<sup>100</sup> However, an "unhealthy" prostitute can have all the abortions she can pay for, while a "healthy" married woman must continue to endure one pregnancy after another, until her "health" breaks down. Government can directly curtail promiscuity by enforcing its adultery and fornication laws, if it so chooses. The abortion statute, however, sweeps broadly to prevent all abortions on "healthy" women, married and unmarried, whether previously chaste or promiscuous. Moreover, compulsory pregnancy and unwanted childhood are severe penalties to pay for a single act of "promiscuous" intercourse. In related

<sup>100</sup> In response to this argument, Dr. Kenneth Ryan stated: "The fear that the availability of abortion will lead to promiscuity is sheer nonsense." Ryan, *Humane Abortion Laws and the Health Needs of Society*, 17 W. RES. L. REV. 424, 432 (1965).

The earliest cases specifically disavowed enforcement of Victorian "morals and decency" as a possible object of the abortion laws, emphasizing that the central purpose was "to guard the health and life of the female. . . ." *State v. Geddicke*, 43 N.J.L. (14 Vroom) 86, 89 (Sup. Ct. 1881).



settings, it has been held that "promiscuity prevention" cannot support a broad and sweeping statute. *See King v. Smith*, 392 U.S. 309, 320 (1968); *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Mr. Justice Goldberg, concurring). Indeed, all evidence seems to indicate that the vast majority of abortions are sought by married women with two or more children.<sup>101</sup>

**4. The statute is not designed to equate the early products of conception with human persons**

Briefs filed by two *amici curiae* have argued at length that Congress has made a legislative judgment, or should have, that the products of conception are to be equated with human persons, from the time of fertilization of the ovum. There is, however, no basis in historic or legislative fact to infer that Congress even considered such a possibility. Nor is there any rational justification for compelling a pregnant woman to accept such a metaphysical approach, when contrary to her personal beliefs.

*Amici's* argument primarily fails because it has never been considered cogent by the Congress. As Appellee has previously shown, the statute was enacted with quite a different purpose in mind, namely the protection of a woman's health from the dangers inherent many years ago in surgical procedures. Induced abortion, because medically dangerous, was prohibited unless necessary to avoid medical complications equal to or greater than those incident to continued pregnancy and eventual childbirth. The focus was not and could not have been the extension of legal "rights" to a developing embryo or fetus. If Congress had

<sup>101</sup> See Tietze, *supra* note 42, at 206 (Hungary, 86% married; Czechoslovakia, 82% married). American data are in accord. P. GEBHARD, *PREGNANCY, BIRTH AND ABORTION* 96-99 (1958).



been acting as *amici* suggest, there would have been no reason for differentiating between an embryo according to the health condition of the pregnant woman. It would be strange to legislate "rights" for an embryo only when the pregnant woman was "healthy," but not when she was "unhealthy." If the embryo had been accorded "rights" superior to those of the woman under any circumstances, the rights could hardly have been considered secondary simply because the woman became "unhealthy" as a consequence of pregnancy. If one imagines, for example, the case of pregnancy caused by rape, forced childbirth would invariably damage the woman's mental if not physical health. The fetus, however, would be no different, aside from the tragic events of its origin, than a fetus in a perfectly healthy woman. Yet, the fetus in the healthy woman would have "rights" superior to those of the woman herself.

The fact that Congress classified the pregnant woman as the "victim" rather than the criminal is also a clear indication of legislative intent. In no case is the woman punished, although she is always the very party who seeks out and persuades the physician to perform the abortion. If Congress had been concerned with bestowing rights on a fetus, there would have been no reason whatever for exempting the woman from liability. Indeed, prosecution of women who obtain abortions is unknown to American law. Since the statute was enacted to protect the woman from dangers in surgery, there was little reason to hold her responsible criminally. Government does not punish the victim, but only the offender. The victim, according to Congress, is the woman, and the offender is the physician. Whatever "rights" may accrue thereby to an embryo do so indirectly, and not by any apparent design of Congress.

*Amici* have endeavored to argue, by reference to decisions in one or more state courts, that certain property and tort "rights" are bestowed upon an embryo. Again, private law decisions from state courts cast little light upon the intent of Congress in enacting a statute restricting abortion to a limited class of pregnant women. Moreover, the presupposition of all such decisions is that a human person has rights that relate back to incidents occurring before birth. The common law treated abortion as a private matter of the woman until advanced stages of pregnancy. This common law developed side-by-side with tort and property law. Neither contradicts the other. It is one thing to hold that injuries to a viable fetus give rise, after birth, to an action for negligence. It is quite another to suggest that these rights entail recognition of the embryo as a human person from the moment at which the injury occurred. Congress has not so acted.

Finally, *amici* have attempted to point out various arguable similarities between developing embryos and their subsequent products, human persons. In addition to such resemblances, there are an equal or greater number of differences. Congress, however, has never engaged in the process of weighing these differences versus similarities. *Amici* wholly fail to explain how it can be inferred that Congress has or would make the value judgments urged in their Briefs. If Congress has—like the American Medical Association and Commissioners on Uniform State Laws—disagreed with the values asserted by *amici*, it is not the province of this Court to overturn such a legislative judgment. In particular, Appellee fails to understand how the fertilized ovum, microscopic in size, could suddenly be endowed with all of the rights and immunities suggested by *amici*. The living ovum, and equally living sperm, possess

potential life in the same sense that a fertilized ovum subsequently possesses life. However, this life is not sufficiently developed to have come within the recognition of law. As Justice Clark has stated:

"The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity—the known rather than the unknown. When sperm meets egg life may eventually form, but quite often it does not. The law does not deal in speculation."<sup>102</sup>

It requires no speculation to discern that Congress has never accepted the drastic position argued by *amici*.

. . . . .

The above appear to be the only remotely relevant justifications the Government might offer to support its present statutory restrictions on abortion. As shown, none amounts to "a subordinating [Government] interest which is compelling. . . ." None embodies the requisite "[p]recision of regulation. . . ." *Griswold v. Connecticut*, 381 U.S. 479, 497, 498 (1965). Accordingly, unless the Government can bring forth compelling justifications of another variety, the restrictive classifications must be struck from the statute and abortion made available to the "healthy" woman as well as the "unhealthy."

<sup>102</sup> Clark, *supra* note 34, at 9-10.

**CONCLUSION**

**For the reasons set out in this Brief, the Judgment below dismissing the indictment should be affirmed.**

**Respectfully submitted,**

**JOSEPH SITNICK**

**1511 K Street, N.W.**

**Washington, D.C. 20005**

**JOSEPH L. NELLIS**

**1819 H Street, N.W.**

**Washington, D.C. 20006**

**ROY LUCAS**

**Four Patchin Place**

**New York, New York 10011**

***Attorneys for Milan M. Vuitich, M.D.***





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IN THE  
**Supreme Court of the United States**

October Term, 1970

No. 84

**THE UNITED STATES,**

*Petitioner,*

**vs.**

**MILAN VUITCH,**

*Respondent.*

**Motion for Leave to File a Brief as Amicus Curiae.**

Robert L. Sassone hereby respectfully moves for leave to file a brief amicus curiae in this case. The consent of the attorneys for the parties has not been obtained.

The interest of Robert L. Sassone in this case arises from the fact that he is the President of LIFE (League for Infants, Fetuses, and the Elderly, an organization of over a thousand individuals, including many clergymen, doctors and attorneys). The members of LIFE fear that declaring abortion control laws unconstitutional may lead to lessened respect for the value of human life.

Certain of the individual members of LIFE have examined certain of the recent lower court decisions, and briefs relating to the constitutionality of abortion control laws. These examinations have indicated that certain statistical, medical and sociological arguments by

defendants have not been answered, or that the answers have omitted important data. In addition, arguments in favor of the right to live of the unborn have omitted important data. The rights of the unborn are relevant in determining the constitutionality of the abortion control law in question. A lesser degree of certainty has been found acceptable in law such as the "reasonable man" of negligence law where the right to be protected is important and the subject matter does not lend itself to a high degree of precision.

The present brief sets forth data in short sections which may be read separately if the court feels that the data in any of the individual sections is relevant and not adequately set forth elsewhere.

Respectfully submitted,

ROBERT E. DUNNE,  
*Attorney for Amicus Curiae.*

Dated: June 30, 1970.

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**Brief of Amicus Curiae Robert L. Sassone  
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Certain of the individual members of LIFE have examined certain of the recent lower court decisions, and briefs relating to the constitutionality of abortion control laws. These examinations have indicated that certain statistical, medial and sociological arguments by defendants have not been answered, or that the answers have omitted important data. In addition, arguments in favor of the right to life of the unborn have omitted important data. The rights of the unborn are relevant

in determining the constitutionality of the abortion control law in question. A lesser degree of certainty has been found acceptable in law such as the "reasonable man" of negligence law where the right to be protected is important and the subject matter does not lend itself to a high degree of precision.

The present brief sets forth data in short sections which may be read separately if the court feels that the data in any of the individual sections is relevant and not adequately set forth elsewhere.

### **Declaring the Present Law Unconstitutional May Not Reduce the Problems Caused by Illegal Abortions.**

Many authorities and studies have indicated that liberalization of abortion laws has increased rather than decreased the number of illegal abortions in Japan and Sweden,<sup>1</sup> Denmark,<sup>2</sup> Colorado<sup>3</sup> and California.<sup>4</sup>

### **A Woman's Right to Privacy and Right to Control Her Own Body Are Limited Rights.**

A woman's right to privacy does not extend so far as to permit her to kill her husband in the privacy of her marital bed. A woman's right to control her own body stops where the rights of other persons begin. For example, a woman's right to control her own body does not permit her to punch somebody else in the nose.

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<sup>1</sup>Rice, "The Vanishing Right To Live", p. 39.

<sup>2</sup>Shaw, "Abortion on Trial", p. 144.

<sup>3</sup>New York Times, December 8, 1969, p. 1.

<sup>4</sup>Dr. Lewis Saylor, State Director of Public Health.

## **The Mother's Right to Privacy and Right to Control Her Own Body Are Limited by Her Child's Right to Life.**

The Constitution and Bill of Rights were adopted a short time after the Declaration of Independence by many of the same men who had signed the Declaration of Independence, so that the ideals expressed in the Declaration of Independence are relevant in interpreting the Constitution and Bill of Rights. The Declaration of Independence indicates that all men have a right to life before birth and that this right is not given by the State or by their mother, and cannot be taken away by the State or by their mother.<sup>5</sup>

The question should be not whether the unborn has a right to life, but when the unborn child acquires a right to life. Nobody denies that a woman has a right to control her own body. The question is whether and when the woman's right to control her own body must be limited because of a conflict with the right of her unborn child over its own body. Certainly, the right to life is a more important right than the right to privacy.

At the first moment that the child has a right to life, the mother's right to privacy and right to control her own body cease to be sufficient to permit the abortion of the child. Of course, even after the mother's right to privacy and right to control her own body become insufficient reason for an abortion, the mother's right to life remains sufficient to permit an abortion.

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<sup>5</sup>"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness."

## **Number of Abortion Caused Deaths Is About 200 Annually.**

Certain investigators have estimated in widely publicized estimates that in the United States 5,000 women die each year from criminal abortions. Bates & Zawadski, *Criminal Abortion*, 3-4 (1964). An examination of the *Vital Statistics of the United States*, 1967, Vol. II, *Mortality Part A*, published by U.S. Department of Health, Education and Welfare, public health service, indicates the number of abortion caused deaths per year. Page 1-7 indicate that the number of deaths caused by abortion has remained relatively constant. Page 1-40 indicate that the number of abortion caused deaths in 1967 was 162. An inference can be made that the figures on page 1-40 include illegal abortion, since the number of non-white deaths is larger than the number of white deaths. Pages 1-150 and 1-151 indicate that relatively few abortion caused deaths are reported as deaths from unknown causes, since only about 1200 women of child bearing years (age 15-44) died from unknown causes, the number of deaths in the individual age groups corresponded more closely with the likelihood of death in the individual age groups than with the likelihood of pregnancy in the individual age groups, and the ratio of female deaths to male deaths during the child bearing years was comparable to the ratio in the non-child bearing years. For example, the ratio of female to male deaths was about 60 to 100 during the non-child bearing years and about 55 to 100 during the ages of 20-24.



## **Pregnancy Is Not More Dangerous Than Abortion During the First Trimester.**

U.S. Vital Statistics indicate a death rate from pregnancy of 0.5 persons per 100,000.<sup>6</sup> 0.1 per 100,000 deaths are caused by abortion, leaving 0.4 deaths per 100,000 caused by complications of pregnancy other than abortion. Superficially, it appears that pregnancy is 4 times as dangerous as abortion. However, the white death rate from pregnancy is less than 30% of the non-white death rate from pregnancy, showing that proper medical care would greatly reduce the 0.4 per 100,000 death rate from pregnancy.

The suicide rate is approximately 10 per 100,000, or 25 times the death rate from pregnancy.<sup>7</sup> The suicide rate among pregnant women is approximately 1/10th the suicide rate among the general public.<sup>8</sup> Accordingly, the reduction in the number of suicides in pregnant women more than makes up for all of the dangers of pregnancy.

In addition to deaths, there are psychological dangers in abortion of presently unknown intensity, duration and frequency. Simon says<sup>9</sup> that there are a wide variety of opinions by psychiatrists as to the after effects of abortion. It appears that nobody can tell at the present time with any degree of certainty what the harmful psychological after effects are likely to be in large groups or individuals, but they may be very severe.

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<sup>6</sup>"Vital Statistics of the United States, 1967, Vol. II, Mortality Part A", p. 1-7.

<sup>7</sup>*Ibid.* P. 1-40.

<sup>8</sup>David Granfield, "The Abortion Decision", pp. 104, 105.

<sup>9</sup>Nathan M. Simon, "Sequelae of Abortion", a Review of the Literature, 1935-1964, Arch. Gen. Psychiat. Vol. 15 October 1966, pp. 378-398.

Of course, unwanted pregnancies also can cause psychological problems in women. Unwanted pregnancies, however, have not been shown to be more dangerous emotionally than abortion.<sup>10</sup>

A large number of authors indicate that the dangers of pregnancy, do not greatly exceed the physical dangers of abortion, the alternative to continuation of the pregnancy.<sup>11</sup>

### **Characteristics of the Unborn Humans Killed by Abortions.**

The acts of a society may in time feed back to change the society. It is useful to know in detail what an abortion kills in order to determine whether the rights of the fetus killed should be closer to the rights of a fertilized egg, which may be killed with impunity, or the rights of a new born child.

The characteristics of the unborn human at each stage of his development are well known to medical science. The following short summaries of characteristics of unborn human beings at various stages of development may prove useful in determining at what stage a new human being is sufficiently developed to deserve rights which limit the rights of more mature human beings.

"Dr. Paul E. Rockwell, an M.D. of Troy, New York, has stated in the Albany Times-Union that I am not a religious person, but it is nevertheless my opinion that if the lawmakers and people

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<sup>10</sup>"Psychiatric Data Held Inadequate as Abortion Guide", Medical Tribune, Vol. 7, No. 72, Wed. June 15, 1966.

<sup>11</sup>Russell Shaw, "Abortion on Trial", pp. 70-97; David Granfield, "The Abortion Decision" pp. 83-121, Charles E. Rice, "The Vanishing Right To Live", pp. 36-48.

realize that very vigorous life is present (in even the youngest fetuses) . . . . abortion would be found much more objectionable than euthanasia."

"Eleven years ago while giving an anaesthetic for ruptured ectopic pregnancy (at two months' gestation) I was handed what I believe was the smallest living human being ever seen. The embryo sac was intact and transparent. Within the sac was a tiny (approx. 1 cm.) human male swimming extremely vigorously in the amniotic fluid, while attached to the wall by the umbilical cord. This tiny human was perfectly developed, with long, tapering fingers, feet and toes . . .

The body was extremely alive and swam about the sac approximately one time per second, with a natural swimmer's stroke. This tiny human did not look at all like the photos and drawings and models of 'embryos' which I have seen, nor did it look like the few embryos I have been able to observe since then, obviously because this one was alive!"<sup>12</sup>

Leading experts on intra-uterine transfusion, are convinced from their experiments that the child at the stage when abortions are usually performed can feel pain.

In the 7th week when the baby weighs one thirtieth of an ounce, if the upper lip is stroked with a fine hair, the arms move.

"The new body not only exists, it also works. The brain, in configuration already like the adult brain, sends out impulses that co-ordinate the func-

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<sup>12</sup>"Liberty 1", an article in "Triumph", April, 1970.

tioning of the other organs. The heart beats sturdily. The stomach produces some digestive juices. The liver manufactures blood cells and the kidneys extract some uric acid from the blood. The muscles of the arms and body can already be set in motion.

When the embryo reaches such completion safely and without impairment, it has a good start in life. Now it is ready to enter the next phase of development. Until adulthood, when full growth is reached between the years of twenty-five and twenty-seven, the changes in the body will be mainly in dimension and in the gradual refinement of the working parts."<sup>18</sup>

About four days after fertilization, there are sixteen cells in the new human. These cells have not yet been implanted so that implantation in the uterus can be prevented by a D & C up to about six or seven days after intercourse. At three to four weeks there is a beating heart. At six weeks the blood vessels from the heart are fully developed and all organs are present. At eight weeks there is readable brain electric activity and the name of the new human changes from embryo to fetus. At nine to ten weeks the child can swallow, squint and has many focal reflexes. At eleven weeks, the baby will suck its thumb and its skeletal details can be clearly seen by x-ray. At twelve weeks, you can take a fetal EKG via the mother. At sixteen weeks, the child can cry. At 20 weeks, it can survive outside the mother.

More than a month prior to the due date, most unborn humans are capable of surviving outside of the

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<sup>18</sup>Flanagan, "First Nine Months of Life", p. 44.

mother without the aid of an unusual artificial environment.

"Unborn babies have brain wave patterns 'similar in many respects to those of an adult', according to Dr. Edward J. Quilligan, chairman of the University of Southern California Department of Obstetrics and Gynecology.

The findings, arising from a series of studies of the central nervous system of the fetus in utero, have caused conjecture about whether learning can be started before an infant is born and whether a fetus can dream . . .

Indicative of paradoxical sleep, blood pressure and pulse rate dropped periodically and rapid eye movement was verified by electrodes in the corner of the fetus' eye in utero.

Various theories postulate that paradoxical sleep is a dream state or a period during which the individual synthesizes and stores the experiences of the previous day. Dr. Quilligan pointed out that though the fetus has always been thought to live in a protected environment, the studies proved the fetal heart rate could be changed by loud noises

. . . <sup>14</sup>

As can be seen from the foregoing descriptions, the unborn human as early as 7 weeks resembles an adult in many important respects. Immediately prior to birth, the unborn human resembles the newly born human in every way but one, he has not passed from his first environment into his second environment.

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<sup>14</sup>"The Modern Medicine", March 23, 1970, p. 43.

### **Birth Control by Morning After Pill or Intrauterine Device Differs From Abortion.**

The morning after pill and intrauterine device prevent the further development of one or more cells, which have not yet implanted or developed or grown significantly larger than the unfertilized egg. The group of cells killed has no brain, heart, organs, or independent means of mobility. In fact, the group of cells killed prior to implantation cannot even be called an individual, since twinning is possible after implantation.

### **Abortion Is Not Necessary for Population Limitation Purposes.**

Abortion is not even relevant to population limitation, since it is well known that a variety of birth control means each of which is safer to the woman than abortion, approach 100% effectiveness when used correctly over an extended period of time. Future research should further improve all means of birth control.

### **Abortion Will Soon Be Irrelevant to the Protection of Any Woman's Rights.**

Recent medical history shows a steady increase in the chances of a very young unborn human to survive and to survive without ill effects if the unborn human is prematurely separated from its mother. Experiments going back into the early 1960's<sup>15</sup> have indicated that artificial wombs for unborn humans are only a matter of time. It is expected that before the present decade ends,<sup>16</sup> that is sometime before 1980, any unborn

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<sup>15</sup>"Alive In An Artificial Womb", an article in "Life Magazine", August 28, 1964.

<sup>16</sup>Gordon Rattray Taylor "The Biological Time Bomb", pp. 37, 38, 207.

human being old enough to have developed a placenta may be removed from its mother, placed in an artificial liquid environment, fed food and oxygen from a heart-lung machine through its placenta, and enabled to develop until it can breathe and eat like a normal newborn child. In a matter of a few short years, any woman wishing to terminate an early pregnancy, will be able to terminate the pregnancy without the death of the child. The doctor will be able to carefully remove the placenta and child and give the child a chance to live, if the law protects the child.

A short look back at the history of contraceptives shows a rapid increase in knowledge and techniques capable of preventing pregnancies. It is likely that 100% certain, simple, inexpensive and safe means of birth prevention will become available before 1980, thereby preventing all unwanted pregnancies, except where the woman changes her mind after the pregnancy has begun.

### **Abortion Control Laws Do Not Establish a Religion.**

Over 100 different and sometimes mutually antagonistic Christian religions in America find guidance from the precepts of the New Testament. St. Luke's Gospel, Chapter 1, vs. 39-45 indicates that the unborn is also a child capable of human emotions. Mormons, Jehovah's Witnesses, and many non-Christian religions forbid abortion. Many persons not believing in any American religion such as Hippocrates, the author of the Hippocratic Oath, have believed abortion should be forbidden, or like Roman poet Ovid, have believed that abortion was worse than the conduct of wild animals.<sup>17</sup>

<sup>17</sup>Russell Shaw, "Abortion on Trial", p. 157. David Granfield, "The Abortion Decision", pp. 43-53. Charles E. Rice, "The Vanishing Right to Live", pp. 41 and 42.



## **There Is Great Danger to Society in Giving Women an Absolute Right to Abortion.**

A society which permits the execution of the very very young for frivolous reasons must take care lest a series of small steps lead to the execution of the very young, the very old and "undesirable" classes of humans. The experience of Nazi Germany is instructive in that abortion became prevalent about 1932. Subsequently, through a gradual process of small steps, voluntary and involuntary euthanasia became legal. Once a precedent is established that one type of human life can be executed for the mere convenience of another type of human life, the precedent may be applied to new situations unforeseen by those who originally established the precedent.

The fact that abortion has the potential to lead to disrespect for human life can be inferred from the manner in which abortion terminates human life. The victim, whose characteristics have been described previously, is innocent of all crime or wrong doing even if the father raped the mother. Even though the mother has received anesthetic, the victim will probably be able to feel pain, as is obvious to anyone who has ever seen a child cry who has just been born from a deeply drugged woman.

Professor Charles E. Rice has described abortion as follows:

"Make no mistake about it. An unborn baby, even a very small one, can put up a determined fight for life. An abortion can be born alive and can kick and go on kicking for quite a long time. It is not difficult to see this as a sort of slow murder. On the other hand, the baby can be killed



while still inside. Is there so much difference? The intention is the same.' . . .

Mrs. Jill Knight, a Member of the British Parliament, observed:

'In Sweden, if the child has not been killed by the operation, they drown it in a bucket like a kitten. The child will kick miserably until it dies.

They also do experiments on aborted babies. Put them in simulated wombs and feed them through the cord, poking them now and again to see if they are still alive.

Why not, I was told—no one wants these babies.' . . .

Listen to Dr. Alan Guttmacher, a leading proponent of abortion, describe the technique:

'A sharp curette is then inserted to the top of the fundus with very little force, for it is during this phase that the uterus is most likely to be perforated. Moderate force can be safely exerted on the down stroke. The whole uterine cavity is curetted with short strokes, by visualizing a clock and making a stroke at each hour. The curette is then withdrawn several times bringing out pieces of placenta and sac. A small ovum forceps is then inserted and the cavity tonged for tissue, much like an oysterman tonging for oysters. . . . In pregnancies beyond the seventh week, fetal parts are recognizable as they are removed piecemeal.'

When Dr. Guttmacher refers clinically to 'fetal parts,' he means arms, legs, a head, and the various other 'parts' that, moments before, comprised

a living human body. Incidentally, some doctors, including Dr. A. W. Liley of New Zealand and Professor James Scott of Leeds, both leading experts on intrauterine transfusions, are convinced from their experiments that the child at the stage when abortions are usually performed can feel pain."<sup>18</sup>

### **Conclusion.**

The statute in question in the present case should be declared constitutional.

### **Summary.**

An analysis of United States Vital Statistics shows approximately 200 abortion caused deaths in the United States annually. Nevertheless it cannot be said that abortion in the first trimester is safer than pregnancy because of the residual after effects of abortion. In addition, statistics indicate that pregnant women are less likely to die than comparable non-pregnant women because the pregnancy caused death rate is far exceeded by the reduced likelihood of suicide. Unborn humans closely resemble mature humans in far more characteristics than they differ. There is a danger that abortion on demand may lead to lessened respect for human life. The positive reasons for abortion are less compelling than the reasons for protecting the right to life of the unborn. Since present trends indicate lessened validity for the arguments for

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<sup>18</sup>Charles E. Rice, "The Vanishing Right To Live", pp. 42 and 43.

abortion in the future, and greater likelihood for survival of the unborn if they are separated from their mother without being killed, the degree of certainty of the law in question should be sufficient, and women should not be found to have an absolute right to execute their unborn children.

Respectfully submitted,

ROBERT E. DUNNE,

*Attorney for Amicus Curiae.*



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IN THE  
**Supreme Court of the United States**

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October Term, 1970  
No. 84

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UNITED STATES OF AMERICA,

*Appellant,*

vs.

MILAN VUITCH, M.D.,

*Appellee.*

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On Appeal From the United States District Court  
for the District of Columbia.

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**Motion for Leave to File Brief Amicus Curiae  
in Support of Appellee.**

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The National Legal Program on Health Problems of the Poor hereby respectfully moves the Court for leave to file its attached brief *amicus curiae* in support of appellee in the above-entitled matter.

The National Legal Program on Health Problems of the Poor is a law reform center sponsored and funded by the U.S. Office of Economic Opportunity to provide support for OEO Legal Services programs across the country in cases involving health problems of the

poor and to provide, through education, research and legal representation, assistance in the preparation of important litigation in health law. The Program is based at the University of California, Los Angeles, School of Law.

The Program believes that restrictive American abortion laws, such as the District of Columbia statute under attack in this action, have a particularly severe impact on the nation's poor and non-white populations. It is the poor and non-white who suffer the most from limited access to legal abortion, and it is they who incur greatly disproportionate numbers of deaths and crippling injuries as a result of being forced to seek criminal abortion. This is the first case to reach the U.S. Supreme Court on the merits of such a restrictive law under the Constitution, and for these reasons the Program is critically interested in the result.

Recognizing that there are a number of grounds for constitutional challenge to the abortion law here under review, the Program, due to the nature of its law reform responsibility, restricts the attached brief to the particular impact of this law on the poor and non-white, and contends that this impact is such as to deny the poor and non-white equal protection of the laws under the due process clause of the Fifth Amendment.

It is the Program's understanding and belief that the principal briefs for appellee will not dwell in any detail on this aspect of the constitutional infirmities

charged, and the Program believes therefore that the equal protection analysis and issues raised in its brief will not be repetitious of other arguments.

Respectfully submitted,

MARILYN G. ROSE,

National Legal Program on  
Health Problems of the Poor,  
U.C.L.A. School of Law,  
Los Angeles, Calif. 90024,

ALAN F. CHARLES,

National Legal Program on  
Health Problems of the Poor,  
U.C.L.A. School of Law,  
Los Angeles, Calif. 90024,

*Attorneys for the National Legal  
Program on Health Problems of  
the Poor.*



## **BRIEF OF AMICUS CURIAE.**

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### **Summary of Argument.**

It is an undeniable fact that abortion in the District of Columbia and in the United States is far more readily available to the white, paying patient than to the poor and non-white. Studies by physicians, sociologists, lawyers and public health experts all reach this same conclusion. The reasons for it are not purely economic, that abortion is an expensive commodity to obtain on the medical marketplace, and it is therefore to be expected that the rich will have easier access to it. The reasons are also that in the facilities which provide free health care for the poor, such as D.C. General Hospital, abortion is simply not made available to the poor and non-white on the same terms and conditions as for the paying patients. The poor know this, and seek criminal abortion, with its resulting high toll of death and infection in vastly disproportionate numbers.

These circumstances are brought about by the existence of restrictive laws, such as D.C. Code §22-201, whereby the legislature has made lay judgments about what conditions must exist before abortion can be legally performed, and has delegated the authority to make such decisions to physicians and committees of physicians under vague standards, with the threat of felony punishment to the physicians if they err on the side of granting abortion. The poor and non-white are unable to shop for doctors and hospitals who will favor

their applications, are unable to obtain the necessary consultations to establish that their conditions qualify them for the treatment and must largely depend on the sympathy of public hospitals and public hospital doctors, with whom they have no personal relationship, and which operate under the government's eye, for the relief they seek. The results, and the statistics of discrimination, are plain.

A woman who seeks abortion and the doctor who desires to give it are asserting certain fundamental rights which have constitutional protection. Among these are the rights to marital, sexual and family privacy and sanctity, the right to choose whether to bear children and the physician's right to practice ethical medicine. These rights are abridged by the state's prohibition on abortions, save in limited, vaguely defined circumstances. In light of that abridgment, the state must demonstrate a compelling interest for its anti-abortion statute.

The state's interest that the woman's health be protected has been rendered obsolete by medical science, which now performs abortions more safely than it brings a mother through pregnancy and childbirth.

The state's interest in discouraging illicit sexual relationships could be better served by laws forbidding these relationships, and not by the indirect and overly broad prohibition on abortion. There is no evidence that the abortion laws deter illicit sexual relationships in any case.



The state's interest in expanding the population lacks any viability today; government policy in all other fields is ranged against it. This interest, if it is one, could be better served by a prohibition on contraception, which probably would be unconstitutional under prior cases.

The state's interest in affording the fetus a constitutional right to life is not supported in the Constitution or in common law.

Absent a compelling state interest, the harsh and adverse discriminatory effect on the poor and non-white in the operation of the D.C. abortion law denies to the poor and non-white the equal protection of the laws, in violation of the due process clause of the Fifth Amendment.

## ARGUMENT.

### I.

**THE APPLICATION AND EFFECT OF THE DISTRICT OF COLUMBIA ABORTION LAW RESULTS IN DISCRIMINATION AGAINST THE POOR AND THE NON-WHITE IN THE PROVISION OF NECESSARY MEDICAL CARE, DENYING TO THE POOR AND NON-WHITE THE EQUAL PROTECTION OF LAWS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.**

A statute which is not on its face discriminatory, nor perhaps even intended by the legislature to establish unreasonable classifications among persons, may nevertheless unconstitutionally deny to certain groups the equal protection of the laws by its application and effect. See, *e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356; *Harper v. Virginia Bd. of Elections*, 383 U.S. 663.

The clear method of application and effect of American abortion laws, and here of the District of Columbia statute, D.C. Code §22-201, is to deny to poor and non-white citizens the equal protection of the laws to which they are entitled under the due process clause of the Fifth Amendment. While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process,' *Schneider v. Rusk*, 377 U.S. 163, 168; *Bolling v. Sharpe*, 347 U.S. 497; *Shapiro v. Thompson*, 394 U.S. 618, 642.

**A. The Application and Effect of the D.C. Abortion Law Results in Discrimination Against the Poor and Non-White in the Provision of Necessary Medical Care.**

There is, basically, a total prohibition in the District of Columbia against the performance of an abortion by anyone, physicians included, except when necessary to preserve the mother's life or health. D.C. Code §22-201.

On its face, the classification provides relief for all those whose lives or health are similarly in need of preservation, and excludes from relief all others.

There is, therefore, a certain category of legally obtainable abortions in the District of Columbia, and presumably a certain group of women who qualify according to life or health threatening conditions, and not according to race or socioeconomic status. When a pregnant woman presents herself to a doctor in such condition that he can medically predict that abortion is necessary to preserve her life or health, then it follows that abortion should be the prescribed treatment. There is nothing demonstrable in the differences of skin color or economic condition that would suggest a substantially smaller proportion of the non-white or the poor would fall into this category as opposed to the white or wealthy.

Yet it has been demonstrated that the non-white and poor do not receive this medical treatment as they need it and thus suffer a particularly harsh and adverse effect from the operation of the statute. The public hos-

pital in the District of Columbia is notorious for sharply limiting and imposing onerous conditions on this service to the detriment of the poor who rely on it for virtually all medical services. See, *e.g.*, *Doe v. Gen'l. Hosp. of the District of Columbia*, .... F. 2d ...., 38 U.S.L.W. 2540 (C.A.D.C. 1970). It is only typical, however:

According to most investigators the private patient is much more likely to have a legal interruption of pregnancy than is the ward patient . . . At the opposite extreme, one finds reputable [private] hospitals permitting abortion for one of every thirty-five to forty deliveries. The variation in the hospitals surveyed . . . extended from no abortions in 24,417 deliveries to one in thirty-six deliveries. It seems inconceivable that medical opinion could vary so widely. Socioeconomic factors must be playing a major role in the decision to abort . . . Niswander, "Medical Abortion Practices in the United States," 17 *W. Res. L. Rev.* 403, 417-19 (1965).

While socioeconomic conditions never *per se* legally warrant therapeutic abortion, socioeconomic status nevertheless frequently determines whether or not an abortion will be performed, whether that self-same abortion will be therapeutic or criminal. Rosen, "Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy," 17 *W. Res. L. Rev.* 435, 450 (1965).

The rich and the poor, it should be noted, are not treated alike: many ethical physicians, for instance, are much more lenient in their application of indications for therapeutic abortion to private

patients than to indigent patients on municipal hospital services. It is the 'private practice' patient, therefore, who can more readily obtain a therapeutic abortion. Kleegman, "Planned Parenthood: Its Influence on Public Health and Family Welfare" in Rosen (ed.), *Abortion in America* 254, 256 (1967).

Perhaps the greatest injustice resulting from our present policies is the creation of a double standard for private and indigent patients . . . Almost universally greater consideration is extended to the private patient for a multitude of reasons which, not infrequently, include a recognition of their social and economic prestige. Mandy, "Reflections of a Gynecologist," in Rosen (ed.), *Abortion in America*, 288-89 (1967).

A prominent national expert in the field, Dr. Robert Hall, has observed that:

One predictable result of the restrictive laws in the United States is that most hospital abortions here are obtained by white upper-class women. One illustrative statistic should suffice: the therapeutic abortion to term birth ratio in the private hospitals in New York City is 1:250; in the municipal hospitals, 1:20,000. Hall, "Abortion Laws: A Call for Reform," 18 *De Paul L. Rev.* 584 (1969).

Dr. Hall also surveyed 65 "outstanding American Hospitals" and discovered that "the incidence of therapeutic abortion is strikingly higher on the private services than on the ward services," noting that the private service rate averaged 3.6 times higher. Hall, "Therapeutic Abortion, Sterilization and Contraception," 91 *Am. J. Obst. & Gynec.* 518, 519 (1965).

Although it is clear that the availability of abortion to white and paying patients has always been greater, a study by Dr. Edwin Gold, reveals that this disparity has been widening over the years. *Gold, et al.*, "Therapeutic Abortions in New York City: A 20-Year Review," 55 *Am. J. Pub. Health*, 964, 968 (1965). One reason for this may be found in the general advancement of medical science and what has been termed the shrinking non-psychiatric indications for abortion. Guttmacher, "The Shrinking Non-Psychiatric Indications for Therapeutic Abortion" in Rosen (ed.), *Therapeutic Abortion* 12 (1954).

Dr. Hall suggests that:

. . . this discrepancy may be attributed to the higher incidence of abortions for psychiatric indications among private patients. Whereas at Sloane Hospital [for Women, in New York City] one therapeutic abortion was performed for psychiatric reasons per 1,149 deliveries on the ward service, the comparable ratio for the private service was one per 104. . . . It would appear therefore that private patients with unwanted pregnancies are more often referred for primary psychiatric evaluation and/or that psychiatric justification for abortion is more easily obtained for private patients. Hall, "Therapeutic Abortion, Sterilization and Contraception," 91 *Am. J. Obst. & Gynec.* 518, 519, 522 (1965).

Thus, if a charity ward or municipal hospital indigent patient is to receive an abortion, it must usually be for observable physical conditions which, as Dr. Guttmacher points out, have declined in importance

as indicia for abortion. Dr. Mary Calderone notes in her study that:

. . . high proportions of therapeutic abortions because of mental conditions may be noted among private patients whether in private or voluntary hospitals. For municipal hospital patients infective and parasitic diseases (mainly tuberculosis) take the lead, as they do among the general service patients in voluntary hospitals. Calderone (ed.), *Abortion in the United States* 78, 80 (1958).

Dr. Hall's survey of 65 major hospitals confirms the same wide discrepancy in granting psychiatrically-related abortions. Hall, *op. cit.* at 518.

In the 1940's, when the majority of abortions were done for medical (non-psychiatric) reasons, the incidence on ward and private services was about the same. In the 1950's, when medical reasons accounted for fewer abortions, the incidence of all abortions on the private services rose to twice that of the ward service. In the 1960's, when the number of abortions for psychiatric reasons rose dramatically, the incidence of all abortions on private services soared to better than twenty times greater than that of the clinic service. Niswander, *op. cit.* at 419.

The reason for this, as Rosen has stated is that . . . by the very nature of things, ward patients are less likely to have the necessary consultations requested, including the psychiatric, and to have the necessary recommendations made and accepted by a hospital board, than are their well-to-do sisters. Ethical and conscientious physicians decry

this fact, but nevertheless find it impossible to controvert . . . Our present state statutes keep the poor, not the rich, from obtaining abortions. Rosen, "A Case Study in Social Hypocrisy," in Rosen (ed.), *Abortion in America* 299 (1967).

It strains credulity to accept such discrepancies as due to natural factors, such as fewer life-threatening conditions among the pregnant poor or non-white whether psychiatric or physical, or an essentially different moral code respecting abortion among the poor and non-white.

Indeed, maternal mortality tables show that poor and non-white women seek abortion, albeit so-called "criminal" abortion, in large numbers. In their New York study, Drs. Gold, *et al.*, *op. cit.* at 970-71, noted that the ratio of criminal abortion deaths per 1000 live births was 4.0 for white women, 8.5 for Puerto Ricans and 16.2 for non-whites. Indeed, criminal abortion is the greatest single cause of maternal mortality in the United States, besides being one of the greatest causes of disease, infection, and resultant crippling and sterilization. See Leavy & Kummer, "Criminal Abortion: Human Hardship & Unyielding Laws", 35 *So. Cal. L. Rev.* 123 (1962); see also *People v. Belous*, 458 P. 2d 194, 200 (Cal. Sup. Ct. 1969), *cert. den.*, 397 U.S. 915.

California, the only state known to officially compile such figures, in its most recent published report notes that approximately 7 percent of that state's non-white female population subjected themselves to criminal abortion in 1968, as opposed to only 1½ percent of the state's white female population. California



Dept. of Public Health, *Third Annual Report on the Implementation of the California Therapeutic Abortion Act*, Tab. 4 (1970).

- B. Where Congress Has Permitted Abortions to Take Place Under Certain Conditions but Has in Effect Delegated Broad Authority, Without Standards, to Physicians to Determine Eligibility for an Abortion Under Conditions Likely to Result and in Fact Resulting in Discrimination Against the Poor and Non-White Populations, With Regard to Fundamental Personal Rights Involving Life Itself and the Privacy and Sanctity of the Family, Congress Has Contravened the Due Process Clause of the Fifth Amendment.**

As Congress has created a protected class of women, it has delegated its authority to determine who falls into this class, and under what life or health-threatening circumstances, to physicians and hospital committees made up of physicians. Hospital committees must approve abortions according to universal hospital practice. See Lader, *Abortion* 26-27 (1966).

This delegation of authority has not been made under what might be called "reasonably fixed statutory standards," which would leave the physicians and their committees with a minimum of discretion in deciding which women would be eligible for abortions under fact situations which clearly fit articulated statutory criteria. See *R. H. Johnson & Co. v. S.E.C.*, 198 F. 2d 690, 695 (2d Cir. 1952). Rather, the decision-making power delegated is under a virtually meaningless and vague standard of what is "necessary for the preservation" of the mother's life or health, an expression struck down as unconstitutionally vague by the

California Supreme Court in *People v. Belous, supra*. The Court said:

The inevitable effect of such delegation may be to deprive a woman of an abortion when under any definition [of 'necessary to preserve' clause] she would be entitled to such an operation, because the state, in delegating the power to decide when an abortion is necessary, has skewed the penalties in one direction: *no* criminal penalties are imposed where the doctor refuses to perform a necessary operation, even if the woman should in fact die . . . The pressures on a physician to decide not to perform an absolutely necessary abortion are . . . enormous . . . 458 P. 2d at 206.

Aside from considerations of constitutional infirmities caused by vagueness or by exclusion of other classes of women from abortion for medical reasons, the delegation of decision-making power, with regard to critical interests or fundamental liberty, to an individual with a pecuniary or personal interest in the decision, is a violation of the due process clause. *Tumey v. Ohio*, 273 U.S. 510, 523. In the case of abortion, the woman's physician and the physicians on the hospital committee have a "direct, personal, substantial, pecuniary interest in reaching a conclusion" that the woman not have an abortion. *People v. Belous, supra* at 206. A delegation of authority to a group with such a substantial personal interest is unconstitutional. See also *Group Health Insurance of New Jersey v. Howell*, 193 A. 2d 103 (N.J. Sup. Ct. 1963).

Furthermore, the decision-making process under this delegation of authority has all the aspects of a star

chamber proceeding. Time is obviously of the essence in considering an application for abortion, and there is no appeal from an abortion committee's decision. The decision is made in private, with no provision for personal appearance by the applicant. See Lader, *Abortion* 26-30 (1966). And in this situation the question to be decided, under the statute, is one of life or death, the most fundamental of all human rights. In *Tumey v. Ohio*, *supra*, authority had been delegated to magistrates to impose jail sentences and fines, deprivations of liberty, even though the magistrates had a pecuniary stake in the outcome of the case. It was this delegation to financially interested magistrates that this Court found unconstitutional. In abortion, the delegation governs the right to life, and even then is skewed heavily against making that decision in favor of the woman's life. *People v. Belous*, *supra* at 206.

There are other fundamental personal rights at stake in the decision to grant or not to grant an abortion. The integrity of marriage and the family, and the relationship of child and parent are subject to serious disruption by negative abortion decisions. Thus in *Skinner v. Oklahoma*, 316 U.S. 535, this Court said:

We are dealing with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. *Id.* at 541.

This Court in *Griswold v. Connecticut*, 381 U.S. 479, reaffirmed the compelling personal interest in the freedom of marriage, marital privacy and limiting family size.

In *Levy v. Louisiana*, 391 U.S. 68, this Court spoke very strongly of family integrity:

In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature to make classifications . . . However that might be, we have been extremely sensitive when it comes to basic civil rights (*Skinner v. Oklahoma, supra*, at 541; . . .). The rights asserted here involve the intimate, familial relationship between a child and his own mother. 391 U.S. at 71.

So also in *Meyer v. Nebraska*, 262 U.S. 390, the Court struck down a statute requiring all families to educate their children in a particular manner since the law infringed the fundamental "right of the individual . . . to establish a home and bring up children." *Id.* at 399.

Thus, the rights to family sanctity, the personal decision to devote one's life and resources to children already in being, to prevent the birth of a rubella-deformed infant who will burden the family and affect the lives of normal siblings, the decision to limit family size as well as the right of the woman to life itself are all subject to invasion in the delegated authority held by these physicians and committees. Where a statute neutral on its face affects these fundamental rights of life, the choice of motherhood and the sanctity of the family, by conferring broad decision-making powers without adequate standards upon a group of individuals with compelling economic and other reasons to make their decision against protecting these rights, then that statute is unconstitutional.

Where a non-white, poor woman is in need of abortion, the delegation of this authority results in denial of equal protection, because the poor woman is restricted by her economic circumstances to seeking abortion in a public indigent care hospital or some other charity ward. Nothing in the law or common medical practice prevents a wealthy woman from consulting with any doctor and going to any hospital most likely to provide the desired treatment.

The denial of abortion to poor women by publicly-employed physicians in public hospitals has the effect of a decision *res judicata*. The more affluent woman may shop among hospitals and doctors until she finds those who will favor her application, even if it has been rejected elsewhere.

The most disastrous result of the abortion committee system has been the economic and social discrimination against one group—the ward patients. In large cities the poor, particularly Negroes and Puerto Ricans, are virtually denied the same medical care as the privileged few. Lader, *Abortion* 29-30 (1966).

The abortion practices of public hospitals and voluntary charity wards cited above, as compared with the same practices in private hospital services, reflect the discriminatory result of this delegation of authority. Thus, in effect, a denial of equal protection results when a statute conferring a right to an abortion upon certain kinds of women operates to confer decision-making authority as to the rich upon numerous abortion-

providers, but in effect results in limiting decision-making authority as to the poor to one or a very few lawful abortion providers with substantial and compelling interests which impair their ability to decide impartially whether a woman is entitled to an abortion. *Griffin v. Illinois*, 351 U.S. 12; *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663.

**C. Where Fundamental Rights Relating to Life, the Right to Choose Not to Bear Children, the Right to Marital and Sexual Privacy, and the Rights Relating to Family Sanctity Are Impaired by the Discrimination in Operation of the Abortion Statute, Having a Particularly Severe Impact on the Poor and Non-White, in Absence of a Compelling State Interest, the Statute Denies Equal Protection in Violation of the Due Process Clause of the Fifth Amendment.**

**1. Fundamental Rights Abridged.**

The Supreme Court has identified certain fundamental rights which cannot be discriminatorily conferred or denied by government. Among these are the right to vote (*Harper v. Virginia Bd. of Elections, supra*); the right to procreate (*Skinner v. Oklahoma, supra*); the right to equal access to appeal from a criminal conviction (*Griffin v. Illinois, supra*) the right to education (*Brown v. Board of Education*, 347 U.S. 483); the right to travel freely (*Edwards v. California*, 314 U.S. 160; and *Shapiro v. Thompson*, 394 U.S. 618). Of these cases, *Brown* was a racial discrimination and the others, except *Skinner*, were discriminations that primarily affected the poor.

Whether one or all of the rights asserted here is considered, *amicus* argues that each is of equal standing with those the Constitution has heretofore been held to protect as fundamental. In fact, each has been recognized as a fundamental right in other cases.

The California Supreme Court in considering and upholding a challenge to an abortion law almost identical to the D.C. statute, declared that the private interests involved were "the woman's right to life and . . . the fundamental right of the woman to choose whether to bear children." *People v. Belous, supra* at 199. The right to marital or sexual privacy was upheld in *Griswold v. Connecticut, supra*. The right to choose not to procreate would seem simply the obverse of the right to procreate in *Skinner v. Oklahoma, supra*.

The sanctity of the family is clearly involved. A woman forced to bear an unwanted child by the statute has her rights, and those of her husband and family, to decide on the size of the family, to apply the limited resources of the family to the upbringing and support of existing children, to the protection of her health and her effective functioning as housewife and mother, all subordinated to the state's purpose. In *Meyer v. Nebraska, supra*, the right of the family to control the education and upbringing of its children was recognized as fundamental. In *Levy v. Louisiana, supra*, the Court gave special protection to the familial relationship of parent and child. In *Griswold v. Connecticut, supra*, the Court found a very strong and overriding personal interest in the parents' decision to limit family size.

The *Griswold* case traced these personal freedoms in the sanctity of the family to "penumbral" rights, nowhere expressly granted in the Constitution. However



they may be based, they have been clearly identified and honored by the Court, and when they are denied to some but not to others by the effect and enforcement of a law, without a compelling state interest, the law has been struck down.

## 2. No Compelling State Interest.

This Court has recently reaffirmed that there are two categories of equal protection analysis. *Dandridge v. Williams*, 397 U.S. 471, 38 U.S.L.W. 4277. The traditional analysis inquires only into whether the classification made has a "reasonable basis," and is generally applied to areas of economic regulation. 38 U.S.L.W. 4281. Where, however, the discrimination abridges fundamental rights, the government must demonstrate a "compelling interest" in order to justify it. 38 U.S.L.W. 4281 and 38 U.S.L.W. 4292 (dissent). In applying the traditional analysis in *Dandridge*, the Court took pains to observe that it was essentially an economic benefits question. 38 U.S.L.W. 4281. The Court carefully excepted from this analysis cases wherein a fundamental constitutional right was infringed, including a right not expressly protected in the Constitution (citing *Shapiro v. Thompson*, 394 U.S. 618, the right to travel, as an example) 38 U.S.L.W. 4281, n.16. Such unexpressed, but nevertheless constitutionally protected fundamental rights are clearly at issue here, commanding the demonstration of a compelling governmental interest. This governmental interest must be shown to outweigh the individual's rights on a scale calibrated by the fundamental nature of the private interest. See "Developments in the Law—Equal Protection," 82 *Harv. L. Rev.* 1065, 1103 (1969). Thus, even if the state had some valid interest in prohibiting abortion save for this classifica-



tion of health urgencies, *amicus* contends that this interest is not of sufficient magnitude to override these fundamental private rights.

The first possible governmental interest, that strict control by the state over abortion is necessary to protect the woman's health is, of course, a justification for strict control of all surgical procedures, not just abortion. The D.C. statute places this kind of control over surgery only on abortion, which militates against the legitimacy of this interest.

When abortion laws were first adopted in this country, surgery was very dangerous. Aseptic procedures and antibiotics were unknown. Nearly 40% of patients undergoing surgery in the early 19th century died. See, e.g., Ober, *Analysis of Surgical Practice at the New York Hospital, 1808-33* 19 (1970); *People v. Belous*, *supra* at 200-01.

Today, however, it is literally safer for a woman to have an abortion in early pregnancy than to go through childbirth. *People v. Belous*, *supra* at 200.

The maternal mortality rate for therapeutic abortion is 3 per 100,000; the maternal mortality rate connected with pregnancy and childbirth is 20 per 100,000. Tietze, "Mortality with Contraception and Induced Abortion," 45 *Studies in Family Planning* 8 (1969).

On the other hand, women who cannot obtain therapeutic abortions because of the law are driven to criminal abortionists where the mortality and morbidity rates are astronomical. See, e.g., Moritz and Thompson, "Septic Abortion," 95 *Am. J. Obst. & Gynec.* 46 (1966); Reid, "Assessment and Management of the Seriously Ill Patient Following Abortion,"

99 *J.A.M.A.* 805 (1967). Indeed, abortion restrictions designed "to protect women from serious risks to life and health [have] in modern times become a scourge." *People v. Belous*, *supra* at 201.

Any justification for abortion laws based on protecting the woman's health has long since been rendered obsolete by medical science, and no compelling state interest in this justification can possibly remain.

Next, it has been contended that restrictions on abortion discourage sexual promiscuity and thus enhance public morality. The best answer to this contention is that the government has more direct means to regulate fornication, adultery, incest and prostitution. Not only is there no evidence that a prohibition on abortion deters this kind of behavior, the existence of a prohibition unlimited to these circumstances sweeps too broadly, prohibiting as it does abortion for an unwanted pregnancy occurring in wedlock as well as that resulting from an illicit relationship. A statute challenged as an invasion of constitutional rights must not have such overbreadth that it forbids legitimate acts as well as illegitimate ones. *NAACP v. Alabama*, 377 U.S. 288; *Shelton v. Tucker*, 364 U.S. 479; *Thornhill v. Alabama*, 310 U.S. 88.

There is no compelling government interest in the protection or encouragement of public (or private) morality in the District of Columbia abortion statute as drawn.

A third possible government interest is in encouraging population growth. The harshest anti-abortion laws existed in societies with an overriding interest in producing soldiers for military conquest, as in ancient

Sparta and Nazi Germany. See Leavy & Kummer, "Criminal Abortion: Human Hardship and Unyielding Laws." 35 *So. Cal. L. Rev.* 123 (1962).

The government cannot seriously contend that the restrictions on abortion are justified by an overriding public interest in increasing the population of the District of Columbia or anywhere else today. See Ehrlich, *The Population Bomb* (1968). It is accepted government policy today to limit family size and encourage family planning. See, e.g., Title V of the Social Security Act, 42 U.S.C. §502. If this were a legitimate interest, Congress might attack the problem more directly by forbidding the prescription, sale and use of contraceptives, and it has been held that the government may not constitutionally do so. *Griswold v. Connecticut*, *supra*; *Baird v. Eisenstadt*, .... F. 2d ...., 39 U.S.L.W. 2013 (1st C. 1970).

Finally, it is suggested that the government has a compelling interest in protecting the rights of the embryo or fetus. In fact, however, the fetus has no constitutional right to live or to be born that the state may protect against the woman's exercise of her own fundamental rights.

A primary argument against the existence of the fetus' "right to life" is the abortion statute itself. If there is such a right, may the District of Columbia constitutionally abridge it when the fetus may endanger the woman's life or health?

The Fourteenth Amendment confers citizenship on "all persons *born* or naturalized . . ." (emphasis added). Neither is there support for such a right in common law, where abortion was not even a crime before quick-

ening of the fetus. See, e.g., *State v. Cooper*, 22 N.J.L. 52 (1849).

It is argued that the fetus enjoys certain rights respecting the inheritance or devolution of property, and of suing to recover for pre-natal injuries it has suffered, and that these help establish the right to life. On the contrary, all such rights exist only in contemplation of live birth, or are rights which are reflections of the parents' interests. See, e.g., *Carroll v. Skloff*, 202 A. 2d 9 (Pa. Sup. Ct. 1964) (ownership of property wholly dependent on live birth); *Prosser on Torts* 356 (1964) (may sue for prenatal injuries "provided he is born alive"); *People v. Belous*, *supra* at 202 ("all of the statutes and rules relief upon [to support the right to life] require a live birth or reflect the interest of the parents").

One recent case seems to go further than any other in establishing a fetus' right to life. In *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 201 A. 2d 537 (N.J. Sup. Ct. 1964), a woman had refused a blood transfusion on religious grounds, although this would have caused destruction of her fetus. The court ordered that the transfusion be given in order to save the fetus. A distinction that may be drawn between that case and a statute such as the one under consideration here, which prohibits abortion at any time during gestation, is that in *Raleigh* the fetus had quickened. This distinction was important to the three judge Federal court in the recent Wisconsin abortion case, as the court said:

The police power of the state does not, however, entitle it to deny a woman the basic right reserved to her under the Ninth Amendment to de-

cide whether she should carry or reject an embryo which has not yet quickened. (Emphasis added.) *Babbitz v. McCann*, 310 F. Supp. 293, 302 (E.D. Wis. 1970).

Another distinction may be drawn from the *Raleigh* case. As the *Belous* court indicated, the "rights" of the fetus asserted there either contemplated live birth or reflected the interest of the parents. 458 P. 2d at 202. In *Raleigh* the woman's interest certainly was that the child live. The pregnancy was not unwanted nor medically contraindicated. The woman as a person, as a marriage partner, as part of a family unit, desired that the child be born alive. The woman was not asserting a right to choose not to bear the child; rather, this consequence was ancillary and undesirable to her. In the abortion situation, however, the interests of the woman and the fetus are contrary. The woman is seeking to assert her rights to personal, marital, sexual and family privacy and integrity, claiming that continuing to bear the fetus itself is a direct threat to those rights. The latter being the contentions made here, the fetus' "rights" may be viewed differently than in the *Raleigh* context.

*People v. Belous*, *supra*, *Babbitz v. McCann*, *supra*, *Roe v. Wade*, .... F. Supp. .... (N.D. Tex. 1970), *Doe v. Bolton*, .... F. Supp. .... (N.D. Ga. 1970), have all either expressly or implicitly rejected the idea that the state has any compelling interest in protecting the rights of the fetus.

Where fundamental rights of the sort in issue here are asserted, the government may not abridge their exercise absent a compelling governmental interest, without violating due process of law. *Bates v. Little Rock*,

361 U.S. 516, 527; *McLaughlin v. Florida*, 379 U.S. 184, 196; *NAACP v. Button*, 371 U.S. 415, 438; *Sherbert v. Verner*, 374 U.S. 398, 403.

It is no help to the position of the government that the D.C. statute contains an indication for abortion, viz., "health", beyond that of the 19th century laws forbidding all abortions except those necessary to preserve the mother's life. See, e.g., Cal. Pen. Code §§274-276, struck down in *People v. Belous*, *supra*; §940.04 Wis. Stats., struck down in *Babbitz v. McCann*, *supra*. The infringement of the woman's right to choose and of the doctor's right to practice medicine exists by virtue of Congress' imposition of any limitations on the choice, the inclusion of provisions whereby the woman's and her doctor's choice may be overruled, and the felony penalties attached to making the choice outside the statute, or making it in error under the statute. As the Wisconsin district court said:

There are a number of situations in which there are especially forceful reasons to support a woman's desire to reject an embryo. These include a rubella or thalidomide pregnancy and one stemming from rape or incest. The instant statute [§940.04 Wis. Stats.] does not distinguish these special cases, but in our opinion, the state does not have a compelling interest even in the normal situation to require a woman to remain pregnant during the early months following her conception. *Babbitz v. McCann*, *supra* at 301-02.

Demonstrating no compelling state interest to justify the statute, its adverse and particularly heavy impact on the fundamental rights of the poor and non-white

is a violation of the equal protection guaranteed them by the due process clause of the Fifth Amendment.

**Conclusion.**

For the reasons stated above, the Court should decide that the District of Columbia abortion law, D.C. Code § 22-201, denies equal protection of the laws to the poor and non-white in violation of the due process clause of the Fifth Amendment, and should affirm the judgment below.

Respectfully submitted,

MARILYN G. ROSE,  
National Legal Program on  
Health Problems of the Poor,

ALAN F. CHARLES,  
National Legal Program on  
Health Problems of the Poor,

*Attorneys for Amicus Curiae National  
Legal Program on Health Problems  
of the Poor.*

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 84.—OCTOBER TERM, 1970

United States, Appellant,	} On Appeal From the United	
v.		States District Court for
Milan Vuitch.		the District of Columbia.

[April 21, 1971]

MR. JUSTICE BLACK delivered the opinion of the Court.\*

Appellee Milan Vuitch, a licensed physician, was indicted in the United States District Court for the District of Columbia for producing and attempting to produce abortions in violation of 22 D. C. Code 201. Before trial, the district judge granted Vuitch's motion to dismiss the indictments on the ground that the District of Columbia abortion law was unconstitutionally vague. 305 F. Supp. 1032 (DCDC 1969). The United States appealed to this Court under the Criminal Appeals Act, 18 U. S. C. § 3731. We postponed decision on jurisdiction to the hearing on the merits, 397 U. S. 1061, and requested the parties to brief and argue specified questions on that issue. 399 U. S. 923. We hold that we have jurisdiction and that the statute is not unconstitutionally vague. We reverse.

## I

The first question is whether we have jurisdiction under the Criminal Appeals Act to entertain this direct appeal from the United States District Court for the

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\*THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE WHITE join in Part I of this opinion. THE CHIEF JUSTICE, MR. JUSTICE HARLAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN join in Part II of this opinion.



District of Columbia. That Act<sup>1</sup> gives us jurisdiction over direct appeals from district court judgments "in all criminal cases . . . dismissing any indictment where such decision is based upon the invalidity . . . of the statute upon which the indictment is founded." 18 U. S. C. § 3731. The decision appealed from is a dismissal of an indictment on the ground that the District of Columbia abortion law, on which the indictment was based, is unconstitutionally vague. This abortion statute, 22 D. C. Code 201, is an Act of Congress applicable only in the District of Columbia and we suggested that the parties argue whether a decision holding unconstitutional such a statute is appealable directly to this Court under the Criminal Appeals Act. The literal wording of the Act plainly includes this statute, even though it applies only to the District. A piece of legislation so limited is nevertheless a "statute" in the sense that it was duly enacted into law by both Houses of Congress and was signed by the President. And the Criminal Appeals Act contains no language that purports to limit or qualify the term "statute." On the contrary, the Act authorizes government appeals from district courts to the Supreme Court in "*all criminal cases*" where a district court judgment dismissing an indictment is based upon the invalidity of the statute on which the indictment is founded.

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<sup>1</sup> The Act states in pertinent part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision of judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded. . . ."  
18 U. S. C. § 3731.

An examination of the legislative history of the Criminal Appeals Act and its amendments suggests no reason why we should depart from the Act's literal meaning and exclude D. C. statutes from its coverage. The committee reports and floor debates contain no discussion indicating that the term "statute" does not include statutes applicable only to the District of Columbia.<sup>2</sup> We therefore conclude that we have jurisdiction over this appeal under the Criminal Appeals Act.

Our Brother HARLAN has argued in dissent that we do not have jurisdiction over this direct appeal. He suggests that such a result is supported by the decision in *United States v. Burroughs*, 289 U. S. 159 (1933), the policy underlying the Criminal Appeals Act, and the canon of construction that statutes governing direct appeals to this Court should be strictly construed.

It is difficult to see how the *Burroughs* decision lends much force to his argument, since that case held only that the term "district court" in the Criminal Appeals Act did not include the then-existing Supreme Court of the District of Columbia. *Id.*, at 163-164. The dissent goes on to suggest the Act should be construed in light of the Congressional purpose of "avoiding inconsistent enforcement of criminal laws." *Post*, at 12. This purpose would not be served by our refusing to decide this case now after it has been orally argued. In the last several years, abortion laws have been repeatedly attacked as unconstitutionally vague in both state and federal courts with widely varying results. A number of these cases are now pending on our docket. A refusal to accept jurisdiction here would only compound confusion for doctors,

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<sup>2</sup> See H. Conf. Rep. No. 8113, 59th Cong., 2d Sess.; H. R. Rep. No. 2119, 59th Cong., 1st Sess.; H. R. Rep. No. 45 and S. Rep. No. 868, 77th Cong., 1st Sess.; H. Conf. Rep. No. 2052, 77th Cong., 2d Sess.

their patients, and law enforcement officials. As this case makes abundantly clear, a ruling on the validity of a statute applicable only to the District can contribute to great disparities and confusion in the enforcement of criminal laws. Finally, my Brother HARLAN's dissent also appears to rely on the fact that this Court has never accepted jurisdiction over a direct appeal under the Criminal Appeals Act involving the validity of a District of Columbia statute. *Post*, at 13. Since this Court has never either accepted or rejected jurisdiction of such an appeal, it is difficult to see how the complete absence of precedent in this Court lends any weight whatever to his argument. Neither previous cases nor the purpose behind the Criminal Appeals Act provides any satisfactory reason why the term "statute" should not include those statutes applicable only in the District of Columbia.

One other procedural problem remains. We asked the parties to brief the question whether the Government could have appealed this case to the Court of Appeals for the District of Columbia under 23 D. C. Code 105, and, if so, whether we should refuse to entertain the appeal here as a matter of sound judicial administration. That D. C. Code provision states:

"In all criminal prosecutions the United States . . . shall have the same right of appeal that is given to the defendant . . . ."

The relationship between the Criminal Appeals Act and this Code section was considered in *Carroll v. United States*, 354 U. S. 394, 411, where the Court concluded:

"[C]riminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U. S. C. 3731 [the Criminal Appeals Act], although as to cases of the type covered by that special jurisdictional statute its explicit direc-

tions will prevail over the general terms of [23 D. C. Code 105]."

Since we have concluded above that this appeal is covered by the Criminal Appeals Act, it would seem to follow from *Carroll* that the Act's provisions control and no appeal could have been taken to the Court of Appeals. Although *Carroll* seems to be dispositive, it has been suggested that it may now be limited by *United States v. Sweet*, 399 U. S. 517 (1970), which contains some language suggesting that the Government may be empowered to take an appeal to the Court of Appeals under 23 D. C. Code 105, even when a direct appeal would be proper here under the Criminal Appeals Act. *Id.*, at 518. We do not elaborate upon that suggestion. We only hold that once an appeal is properly here under the Criminal Appeals Act, we should not refuse to consider it because it might have been taken to another court.

## II

We turn now to the merits. Appellee Milan Vuitch was indicted for producing and attempting to produce abortions in violation of 22 D. C. Code 201. That Act provides in part:

"Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; . . ."

Without waiting for trial, the District Judge dismissed the indictment on the ground that the abortion statute

was unconstitutionally vague. In his view, set out substantially in full below,<sup>2</sup> the statute was vague for two principal reasons:

1. The fact that once an abortion was proved a physician "is presumed guilty and remains so unless a jury

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<sup>2</sup> The District Judge stated:

" . . . It is suggested that these words [as necessary for the preservation of the mother's life or health] are not precise; that, as interpreted, they improperly limit the physician in carrying out his professional responsibilities; and that they interfere with a woman's right to avoid childbirth for any reason. The word "health" is not defined and in fact remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health. While the law generally has been careful not to interfere with medical judgment of competent physicians in treatment of individual patients, the physician in this instance is placed in a particularly unconscionable position under the conflicting and inadequate interpretations of the D. C. abortion statute now prevailing. The Court of Appeals established by such early cases as *Peckham v. United States*, 96 U. S. App. D. C. 312 (1955), *cert. denied*, 350 U. S. 912, and *Williams v. United States*, 78 U. S. App. D. C. 147 (1943), that upon the Government establishing that a physician committed an abortion, the burden shifted to the physician to justify his acts. In other words, he is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health. These holdings, which may well offend the Fifth Amendment of the Constitution, as interpreted in recent decisions such as *Leary v. United States*, 395 U. S. 89 Sup. Ct. 1532, 23 L. Ed. 2d 658 (1965), and *United States v. Gainey*, 380 U. S. 63, 85, Sup. Ct. 754, 13 L. Ed. 2d 658 (1965), also emphasize the lack of necessary precision in this criminal statute. The jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word 'health' should not determine whether he stands convicted of a felony, facing ten years' imprisonment. His professional judgment made in good faith should not be challenged. There is no clear standard to guide either the doctor, the jury or the Court. No body of medical knowledge delineates what degree of mental or physical health or combination of the two is required to make an abortion conducted by a competent physician legal or illegal under the Code. . . ." 305 F. Supp. 1032, at 1034.

can be persuaded that his acts were necessary for the preservation of the woman's life or health."

2. The presence of the "ambivalent and uncertain word 'health.'"

In concluding that the statute places the burden of persuasion on the defendant once the fact of an abortion has been proved,<sup>4</sup> the court relied on *Williams v. United States*, 138 F. 2d 81 (CA DC 1943). There the Court of Appeals for the District of Columbia held that the prosecution was not required to prove as part of its case in chief that the operation was not necessary to preserve life or health. *Id.*, at 81, 83. The court indicated that once the prosecution established that an abortion had been performed the defendant was required "to come forward with evidence which with or without other evidence is sufficient to create reasonable doubt of guilt." *Id.*, at 84. The District Court here appears to have read *Williams* as holding that once an abortion is proved, the burden of persuading the jury that it was legal (i. e., necessary to the preservation of the mother's life or health) is cast upon the physician. Whether or not this is a correct reading of *Williams*, we believe it is an erroneous interpretation of the statute. Certainly a statute that outlawed only a limited category of abortions but "presumed" guilt whenever the mere fact of abortion was established, would at the very least present serious constitutional problems under this Court's previous decision interpreting the Fifth Amendment. *Tot v. United States*, 319 U. S. 463 (1943); *Leary v. United States*, 395 U. S. 6, 36 (1969). But of course statutes should be construed whenever possible so as to uphold their constitutionality.

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<sup>4</sup> The trial court also cited *Peckham v. United States*, 226 F. 2d 34 (CA DC 1955), as dealing with the D. C. abortion law. However, the opinion in that case does not discuss the burden of proof under the statute.

The statute does not outlaw all abortions, but only those which are not performed under the direction of a competent, licensed physician, and those not necessary to preserve the mother's life or health. It is a general guide to the interpretation of criminal statutes that when an exception is incorporated in the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception. When Congress passed the District of Columbia abortion law in 1901 and amended it in 1953, it expressly authorized physicians to perform such abortions as are necessary to preserve the mother's "life or health." Because abortions were authorized only in more restrictive circumstances under previous D. C. law, the change must represent a judgment by Congress that it is desirable that women be able to obtain abortions needed for the preservation of their lives or health.<sup>8</sup> It would be highly anomalous for a legislature to authorize abortions necessary for life or health and then to demand that a doctor, upon pain of one to ten years' imprisonment, bear the burden of proving that an abortion he performed fell within that category. Placing such a burden of proof on a doctor would be peculiarly inconsistent with society's notions of the responsibilities of the medical profession. Generally, doctors are encouraged by society's expectations, by the strictures of malpractice law and by their own professional standards to give their patients such treatment as is necessary to preserve their health. We are unable to believe that Congress intended that a physician be required to prove his innocence. We therefore hold that under 22 D. C. Code 201, the burden is on

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<sup>8</sup> Before 1901 the existing statute allowed abortion only "for the purpose of preserving the life of any woman pregnant . . . ." Abert, *The Compiled Statutes in Force in the District of Columbia*, c. XVI, pp. 158-159 (1894).

the prosecution to plead and prove than an abortion was not "necessary for the preservation of the mother's life or health."

There remains the contention that the word "health" is so imprecise and has so uncertain a meaning that it fails to inform a defendant of the charge against him and therefore the statute offends the Due Process Clause of the Constitution. See, e. g., *Lanzetta v. New Jersey*, 306 U. S. 451 (1939). We hold that it does not. The trial court apparently felt that the term was vague because there "is no indication whether it includes varying degrees of mental as well as physical health." 305 F. Supp. 1032, at 1034. It is true that the legislative history of the statute gives no guidance as to whether "health" refers to both a patient's mental and physical state. The term "health" was introduced into the law in 1901 when the statute was enacted in substantially its present form. The House Report\* on the bill contains no discussion of the term "health" and there was no Senate report. Nor have we found any District of Columbia cases prior to this district court decision that shed any light on the question. Since that decision, however, the issue has been considered in *Doe v. General Hospital of the District of Columbia*, 313 F. Supp. 1170 (DCDC 1970). There District Judge Waddy construed the statute to permit abortions "for mental health reasons whether or not the patients had a previous history of mental defects." *Id.*, at 1174-1175. The same construction was followed by the United States Court of Appeals for the District of Columbia in further proceedings in the same case. *Doe v. General Hospital of the District of Columbia*, 434 F. 2d 423; 434 F. 2d 427 (CADC 1970). We see no reason why this interpretation of the statute should not

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\* H. R. Rep. No. 1017, 56th Cong., 1st Sess.



be followed. Certainly this construction accords with the general usage and modern understanding of the word "health," which includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as "the state of being sound in body or mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.<sup>1</sup>

We therefore hold that properly construed the District of Columbia abortion law is not unconstitutionally vague, and that the trial court erred in dismissing the indictments on that ground. Appellee has suggested that there are other reasons why the dismissal of the indictment should be affirmed. Essentially, these arguments are based on this Court's decision in *Griswold v. Connecticut*, 381 U. S. 479 (1965). Although there was some reference to these arguments in the opinion of the court below, we read it as holding simply that the statute was void for vagueness because it failed in that court's language to "give that certainty which due process of law considers essential in a criminal statute." 305 F. Supp. 1032, at 1034. Since that question of vagueness was the only issue passed upon by the District Court it is the

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<sup>1</sup> Our Brother DOUGLAS appears to fear that juries might convict doctors in any abortion case simply because some jurors believe all abortions are evil. Of course such a danger exists in all criminal cases, not merely those involving abortions. But there are well-established methods defendants may use to protect themselves against such jury prejudice: continuances, changes of venue, challenges to prospective jurors on *voir dire*, and motions to set aside verdicts which may have been produced by prejudice. And of course a court should always set aside a jury verdict of guilt when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt.

only issue we reach here. *United States v. Borden Co.*, 308 U. S. 188 (1939); *United States v. Petrillo*, 332 U. S. 1 (1947); *United States v. Blue*, 384 U. S. 251, 256 (1966).

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

**Reversed.**



# SUPREME COURT OF THE UNITED STATES

No. 84.—OCTOBER TERM, 1970

United States, Appellant,	}	On Appeal From the United States District Court for The District of Columbia.
v.		
Milan Vuitch.		

[April 21, 1971]

MR. JUSTICE WHITE, concurring.

I join the Court's opinion and judgment. As to the facial vagueness argument, I have these few additional words. This case comes to us unilluminated by facts or record. The District Court's holding that the District of Columbia statute is unconstitutionally vague on its face because it proscribes all abortions except those necessary for the preservation of the mother's life or health was a judgment that the average person could not understand which abortions were permitted and which were prohibited. But surely the statute puts everyone on adequate notice that the health of the mother, whatever that phrase means, was the governing standard. It should also be absolutely clear that a doctor is not free to perform abortions on request without considering whether the patient's health required it. No one of average intelligence could believe that under this statute abortions not dictated by health considerations are legal. Thus even if the "health" standard were unconstitutionally vague, which I agree is not the case, the statute is not void on its face since it reaches a class of cases in which the meaning of "health" is irrelevant and no possible vagueness problem could arise. We do not, of course, know whether this is one of those cases. Until we do facial vagueness claims must fail. Cf. *United States v. National Dairy Corp.*, 372 U. S. 29 (1963).

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# SUPREME COURT OF THE UNITED STATES

No. 84.—OCTOBER TERM, 1970

United States, Appellant,	}	On Appeal From the United States District Court for the District of Columbia.
v.		
Milan Vuitch.		

[April 21, 1971]

MR. JUSTICE DOUGLAS, dissenting in part.

While I agree with Part I of the Court's opinion that we have jurisdiction over this appeal, I do not think the statute meets the requirements of procedural due process.

The District of Columbia Code makes it a felony for a physician to perform an abortion "unless the same were done as necessary for the preservation of the mother's life or health." 22 D. C. Code 201.

I agree with the Court that a physician—within the limits of his own expertise—would be able to say that an abortion at a particular time performed on a designated patient would or would not be necessary for the "preservation" of her "life or health." That judgment, however, is highly subjective, dependent on the training and insight of the particular physician and his standard as to what is "necessary" for the "preservation" of the mother's "life or health."

The answers may well differ, physician to physician. Those trained in conventional obstetrics may have one answer; those with deeper psychiatric insight may have another. Each answer is clear to the particular physician. If we could read the Act as making that determination conclusive, not subject to review by judge and by jury, the case would be simple, as MR. JUSTICE STEWART points out. But that does such violence to the statutory

scheme that I believe it is beyond the range of judicial interpretation so to read the Act. If it is to be revised in that manner, Congress should do it.

Hence I read the Act, as did the District Court, as requiring submission to court and jury of the physician's decision. What will the jury say? The prejudices of jurors are customarily taken care of by challenges for cause and by preemptory challenges. But vagueness of criminal statutes introduces another element that is uncontrollable. Are the concepts so vague that possible offenders have no safe guidelines for their own action? Are the concepts so vague that jurors can give them a gloss and meaning drawn from their own predilections and prejudices? Is the statutory standard so easy to manipulate that although physicians can make good-faith decisions based on the standard, juries can nonetheless make felons out of them?

The Court said in *Lanetta v. New Jersey*, 306 U. S. 451, 453, that a ". . . statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process."

A three-judge court in evaluating a Texas statutory standard as to whether an abortion was attempted "for the purpose of saving the life of the mother" said:

"How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an ascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? How *imminent* must death be if the abortion is not performed? Is it sufficient if having the child will shorten the life of the woman by a number of years?" *Roe v. Wade*, 314 F. Supp. 1217, 1223.

The *Roe* case was followed by a three-judge court in *Doe v. Scott*, — F. Supp. —, which struck down an Illinois statute which sanctioned an abortion "necessary for the preservation of a woman's life." And see *People v. Belous*, 71 Cal. 2d 954, 458 Pac. 2d 194.

A doctor may well remove an appendix far in advance of rupture in order to prevent a risk that may never materialize. May he do the same under this abortion statute?

May he perform abortions on unmarried woman who want to avoid the "stigma" of having an illegitimate child? Is bearing a "stigma" a "health" factor? Only in isolated cases? Or is it such whenever the woman is unmarried?

Is any unwanted pregnancy a "health" factor because it is a source of anxiety?

Is an abortion "necessary" in the statutory sense if the doctor thought that an additional child in a family would unduly tax the mother's physical well-being by reason of the additional work which would be forced upon her?

Would a doctor be violating the law if he performed an abortion because the added expense of another child in the family would drain its resources, leaving an anxious mother with an insufficient budget to buy nutritious food?

Is the fate of an unwanted child or the plight of the family into which it is born relevant to the factor of the mother's "health?"

Mr. Justice Holmes, in holding that "unreasonable" restraint of trade was an adequate constitutional standard of criminality, said in *Nash v. United States*, 229 U. S. 373, 377, that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he



incur a fine or a short imprisonment, as here; he may incur the penalty of death."

He wrote in a context of economic regulations which are restrained by few, if any, constitutional guarantees.

Where, however, constitutional guarantees are implicated, the standards of certainty are more exacting.

*Winters v. New York*, 333 U. S. 507, 514, 519, held void-for-vagueness a state statute which as construed made it a crime to print stories of crime "so massed as to incite to crime," since such a regulatory scheme trenched on First Amendment rights of the press.

The standard of "sacrilegious" can be used in such accordion-like way as to infringe on religious rights protected by the First Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 505.

The requirement of a "narrowly drawn" statute when the regulation touches a protected constitutional right (*Cantwell v. Connecticut*, 310 U. S. 296, 311; *Thornhill v. Alabama*, 310 U. S. 88, 100) is only another facet of the void-for-vagueness problem.

What the Court held in *Herndon v. Lowry*, 301 U. S. 242, is extremely relevant here. The ban of publications made to incite insurrection was held to suffer the vice of vagueness:

"The statute, as construed and applied in the appellant's trial, does not furnish a sufficiently ascertainable standard of guilt. . . . Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be convicted of the offense of inciting insurrection. . . . The law, as

*thus construed, licenses the jury to create its own standard in each case.*" *Id.*, 261, 262, 263. (Italics added.)

If these requirements of certainty are not imposed then the triers of fact have "a power to invade imperceptibly (and thus unreviewably) a realm of constitutionally protected personal liberties." Amsterdam, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 104 (1960).

Abortion touches intimate affairs of the family, of marriage, of sex, which in *Griswold v. Connecticut*, 381 U. S. 479, we held to involve rights associated with several express constitutional rights and which are summed up in "the right of privacy." They include the right to procreate (*Skinner v. Oklahoma*, 316 U. S. 535), the right to marry across the color line (*Loving v. Virginia*, 388 U. S. 1), the intimate familial relations between children and parents (*Meyer v. Nebraska*, 262 U. S. 390; *Levy v. Louisiana*, 391 U. S. 68, 71-72). There is a compelling personal interest in marital privacy and in the limitation of family size. And on the other side is the belief of many that the fetus, once formed, is a member of the human family and that mere personal inconvenience cannot justify his destruction. This is not to say that government is powerless to legislate on abortions. Yet the laws enacted must not trench on constitutional guarantees which they can easily do unless closely confined.

Abortion statutes deal with conduct which is heavily weighted with religious teachings and ethical concepts.<sup>1</sup>

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<sup>1</sup>"There remains the moral issue of abortion as murder. We submit that this is insoluble, a matter of religious philosophy and religious principle and not a matter of fact. We suggest that those who believe abortion is murder need not avail themselves of it. On the other hand, we do not believe that such conviction should limit

Mr. Justice Jackson once spoke of the "treacherous grounds we tread when we undertake to translate ethical concepts into legal ones, case by case." *Jordan v. De George*, 341 U. S. 223, 242 (dissenting). The difficulty and danger are compounded when religion adds another layer of prejudice.<sup>2</sup> The end result is that juries condemn what they personally disapprove.

The subject of abortions—like cases involving obscenity<sup>3</sup>—is one of the most inflammatory ones to reach

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the freedom of those not bound by identical religious conviction. Although the moral issue hangs like a threatening cloud over any open discussion of abortion, the moral issues are not all one-sided. The psychoanalyst Erik Erikson stated the other side well when he suggested that 'The most deadly of all possible sins is the mutilation of a child's spirit.' There can be nothing more destructive to a child's spirit than being unwanted, and there are few things more disruptive to a woman's spirit than being forced without love or need into motherhood." VII The Right to Abortion: A Psychiatric View, pp. 218-219 (Group for the Advancement of Psychiatry, 1969).

<sup>2</sup> Mr. Justice Clark recently wrote: "Throughout history religious belief has wielded a vital influence on society's attitude regarding abortion. The religious issues involved are perhaps the most frequently debated aspects of abortion. At the center of the ecclesiastical debate is the concept of 'ensoulment' or 'person-hood,' i. e., the time at which the fetus becomes a human organism. The Reverend Joseph F. Donceel of Fordham University admitted that no one can determine with certainty the exact moment at which 'ensoulment' occurs, but we must deal with the moral problems of aborting a fetus even if it has not taken place. Many Roman Catholics believe that the soul is a gift of God given at conception. This leads to the conclusion that aborting a pregnancy at any time amounts to the taking of a human life and is therefore against the will of God. Others, including some Catholics, believe that abortion should be legal until the baby is viable, i. e., able to support itself outside the womb. In balancing the evils, the latter conclude that the evil of destroying the fetus is outweighed by the social evils accompanying forced pregnancy and childbirth." Religion, Morality and Abortion: A Constitutional Appraisal, 2 Loy. L. Rev. 1, 4 (1969).

<sup>3</sup> I have expressed my views on the vagueness of criminal laws governing obscenity in *Dyson v. Stein*, decided February 23, 1971

the Court. People instantly take sides and the public, from whom juries are drawn, makes up its mind one way or the other before the case is even argued. The interests of the mother and the fetus are opposed. On which side should the State throw its weight? The issue is volatile; and it is resolved by the moral code which an individual has. That means that jurors may give it such meaning as they choose, while physicians are left to operate outside the law. Unless the statutory code of conduct is stable and in very narrow bounds, juries have a wide range and physicians have no reliable guideposts. The words "necessary for the preservation of the mother's life or health" become free-wheeling concepts, too easily taking on meaning from the juror's predilections or religious prejudices.

I would affirm the dismissal of this indictment and leave to the experts the drafting of abortion laws<sup>4</sup> that protect good-faith medical practitioners from the treacheries of the present law.

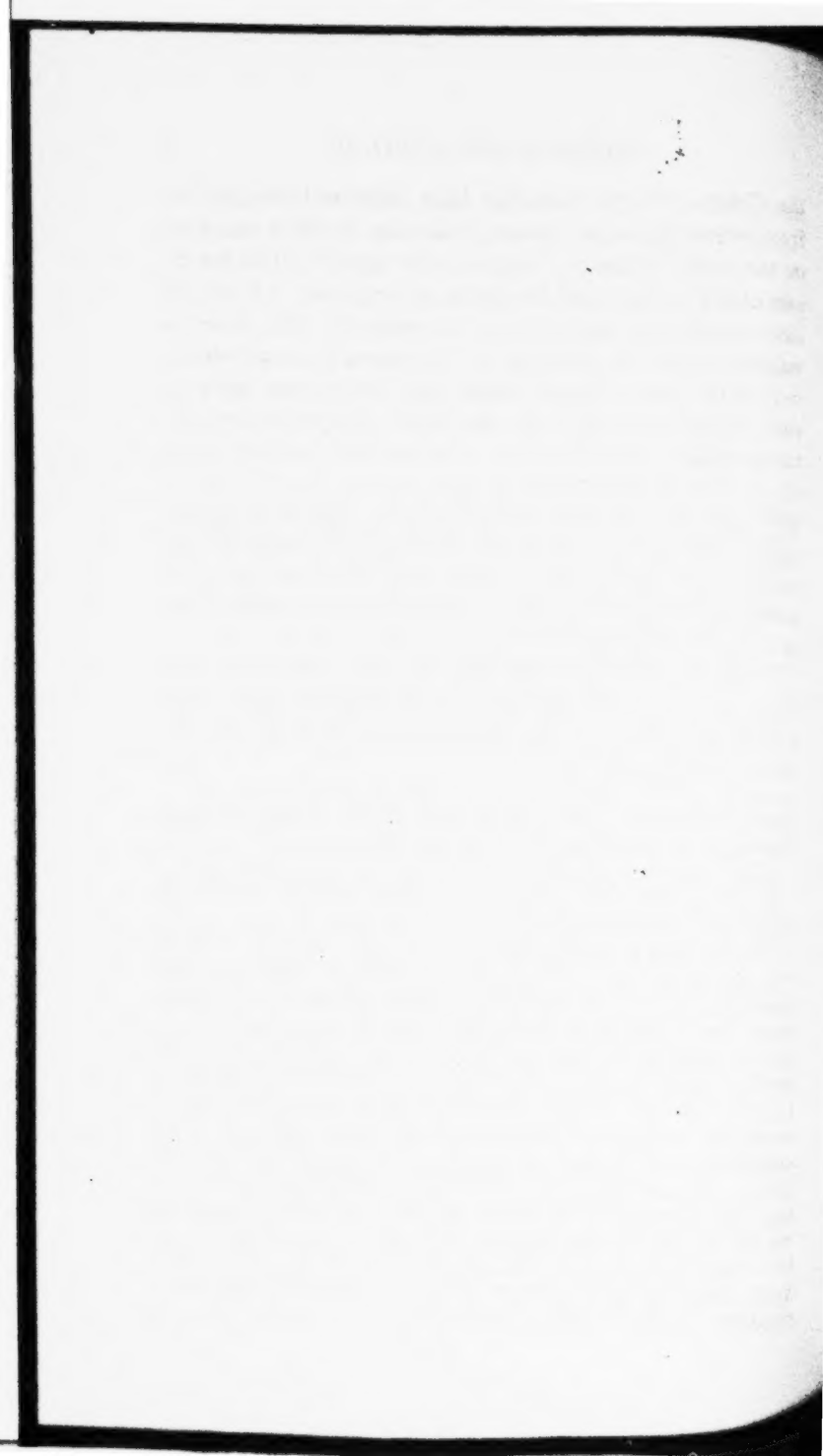
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(dissenting opinion). And see the dissent of Mr. Justice Black in *Ginsburg v. United States*, 383 U. S. 463, 477.

<sup>4</sup> Clark, *supra* n. 2, at 10-11.

Cf. New York's new abortion law effective July 1, 1970, 39 McKinney's Consol. L. § 125.05:

"An abortifacient action is justifiable when committed upon a female with her consent by a duly licensed physician (a) under a reasonable belief that such is necessary to preserve her life, or, (b) within twenty-four weeks from the commencement of her pregnancy. A pregnant female's commission of an abortifacient act upon herself is justifiable when she acts upon the advice of a duly licensed physician (1) that such act is necessary to preserve her life, or, (2) within twenty-four weeks from the commencement of her pregnancy. The submission by a female to an abortifacient act is justifiable when she believes that it is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy." And see Hall, *The Truth About Abortion in New York*, Columbia Forum, Winter 1970, p. 18; Schwartz, *The Abortion Laws*, 67 Ohio St. Med. J. 33 (1971).



# SUPREME COURT OF THE UNITED STATES

No. 84.—OCTOBER TERM, 1970

United States, Appellant,		On Appeal From the United States District Court for the District of Columbia.
v.		
Milan Vuitch.		

[April 21, 1971]

MR. JUSTICE HARLAN, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting as to jurisdiction.

Appellee Vuitch was indicted in the United States District Court for the District of Columbia for violations of 22 D. C. Code 201, the District of Columbia abortion statute. This statute is applicable only within the District of Columbia. On pretrial motion by Vuitch, the indictments were dismissed on the ground that the abortion statute was unconstitutionally vague. The United States appealed directly to this Court under the terms of the Criminal Appeals Act of 1907, 18 U. S. C. § 3731, relying on the provision allowing direct appeal "[f]rom a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded."<sup>1</sup> It is not contested that, but for this provision of the Criminal Appeals Act, the Government would have a right of appeal to the Court of

<sup>1</sup> The text of 18 U. S. C. § 3731 was as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based

Appeals for the District of Columbia under 23 D. C. Code 105, which provides:

"In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall

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upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

"From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

"The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

"If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

"If an appeal shall be taken pursuant to this section to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court."

As noted in *United States v. Weller*, No. 77, October Term 1970 (decided Feb. 24, 1971), these provisions were amended by § 14 (a) of the Omnibus Crime Control Act of 1970, 84 Stat. 1890 (1971). But cases begun in the District Court before the new statute took effect are not affected. See *United States v. Weller*, *supra*, at n. 1.

have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided*, That if on such appeal it shall be found that there was error in the rulings of the court during a trial, a verdict in favor of the defendant shall not be set aside."

The Court today—relying on the generic reference to "statutes" and "all criminal cases" in the text of 18 U. S. C. § 3731 and the absence of an express exclusion of statutes applicable only within the District of Columbia—concludes that 18 U. S. C. § 3731 rather than 23 D. C. Code 105 provides the proper appellate route for this case. I must disagree.

## I

The historical development of the Government's right to appeal in criminal cases both in the District of Columbia and throughout the Nation is surveyed in *Carroll v. United States*, 354 U. S. 394 (1957). Section 105 of the D. C. Code was passed in 1901 as § 935 of the Code of 1901. 31 Stat. 1341. Prior to the Criminal Appeals Act of 1907, the Government had no right of appeal in criminal cases outside of the District of Columbia. To remedy this situation, a bill was introduced in the House of Representatives. That bill practically tracked the language of the D. C. statute, and made no provision for direct appeal to this Court. 40 Cong. Rec. 5408. The accompanying House Report described the bill as follows: "The accompanying bill will extend [§ 935] of the code of the District of Columbia to all districts in the United States." H. R. Rep. No. 2119, 59th Cong., 1st Sess., at 2 (1906). That bill passed the House, but the Senate Committee on the Judiciary rejected the House approach of simply extending the provisions of the D. C. appeals statute to the rest of the Nation; the Senate Committee instead substituted a more narrowly drawn measure



which enumerated specific substantive categories of criminal cases to be appealable by the Government and allocated jurisdiction over these appeals between the Supreme Court and the then Circuit Courts of Appeals according to the allocation of appellate jurisdiction for civil cases established in the Circuit Court of Appeals Act of 1891. S. Rep. No. 3922, 59th Cong., 1st Sess. (1906). See *Carroll v. United States*, *supra*, at 402 n. 11. Even that bill as narrowed could not pass the Senate; it provoked extended debate in which the opponents of the measure focused on the potential for abuse of individual rights arising from repeated court proceedings, delays in appeals, and restraints on personal freedom while the Government prosecuted its appeal. See generally *United States v. Sisson*, 399 U. S. 267 (1970). The upshot of these debates was that Senator Nelson, the bill's floor manager in the Senate, agreed to accept a variety of amendments which further narrowed the categories of cases appealable by the Government and made special provision for the defendant's release on his own recognizance. See 41 Cong. Rec. 2818-2825.<sup>2</sup>

It is at this point that Senator Clarke of Arkansas offered an amendment limiting the Government's right to appeal decisions dismissing indictments or arresting judgments for insufficiency of the indictment to instances where the decision was based upon "the validity or construction of the statute." The purpose of that amendment was described by Senator Clarke as follows:

"Mr. President, the object of the amendment is to limit the right of appeal upon the part of the General Government to the validity or constitutionality of the statute in which the prosecution is proceeding. It has been enlarged by the addition of another

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<sup>2</sup> The bill had been amended earlier to require the Government to take an appeal within 30 days. 41 Cong. Rec. 2193-2194.

clause, which gives the right of appeal where the construction by the trial court is such as to decide that there is no offense committed, notwithstanding the validity of the statute, and in other respects the proceeding may remain intact. I think that is a broad enough right to concede to the General Government in the prosecution of persons in the court.

"In view of the defects that recent years have disclosed, I do not believe it to be sound policy to go beyond the necessities as they have developed defects in our procedure. A case recently occurring has drawn attention to the fact that if a circuit judge or a district judge holding the circuit should determine that a statute of Congress was invalid, the United States is without means of having that matter submitted to a tribunal that under the Constitution has power to settle that question. I do not believe the remedy ought to be any wider than the mischief that has been disclosed. I do not believe that any additional advantages ought to be given to the General Government in the prosecution of persons arraigned in court, but I do believe the paragraph ought to be perfected in that behalf, so as to provide that there shall be an appeal to the court having authority to give uniformity to the practice which shall prevail in all the courts of the United States, and that they shall be ready to say, and say promptly, what the statute means and whether or not it is a valid statute.

"So I think this amendment gives expression to the proposition that the remedy we provide here now should be no wider than the defect that has been disclosed in the preceding criminal procedure; and that is that whenever the validity of a statute has

been adversely decided by a trial court, wherever its unconstitutionality has been pronounced by a trial court, the Government ought to have the right to promptly submit that to the tribunal having authority to dispose of such questions in order that there may be a uniform enforcement of the law throughout the entire limits of the United States.

"This is the purpose, I have, Mr. President, and having discussed it with the distinguished Senator from Wisconsin . . . and the distinguished Senator from Minnesota [Mr. Nelson], we agreed that that would probably meet the defect." 41 Cong. Rec. 2819-2820. See generally 41 Cong. Rec. 2819-2822.

The bill as thus amended passed the Senate; the House disagreed to the Senate amendment, but yielded in conference. The bill in conference was amended to provide for direct appeals to the Supreme Court. See H. R. Conf. Rep. No. 8113, 59th Cong., 2d Sess. (1970). No explanation was given in the conference report for the exclusive direct appeal route.

I draw from these legislative materials the following relevant propositions: (1) The Congress was definitely advertent to the existence of a governmental appeal right in criminal cases within the District; (2) the Congress explicitly rejected the simple approach of extending the D. C. provision to the Nation; (3) the particular provision of the Act relied on by the Government as supporting its direct appeal in this case was amended with a view to limiting its reach to a relatively precise defect; i. e., the debilitating effect on the enforcement of criminal laws arising from conflicting judicial interpretations; and (4) the substitution of an exclusive direct appeal to this Court, while not expressly explained, is perfectly compatible with the goal of promptly achieving uniformity in construction of statutes applicable nationwide, while at the same time being wholly unnecessary to the resolu-

tion of conflicting district court constructions of local D. C. statutes, given the existence of a right of appeal to the Court of Appeals for the District of Columbia.

## II

The question of overlap between the appellate routes available to the Government in criminal cases under the D. C. Code and 18 U. S. C. § 3731 was first dealt with by this Court in *United States v. Burroughs*, 289 U. S. 159 (1933). In *Burroughs* the defendants were indicted in the then Supreme Court of the District of Columbia for violation of the Federal Corrupt Practices Act, a statute of nationwide applicability. They successfully demurred on two grounds: one involving the construction of the statute, and the other involving the sufficiency of the indictment as a pleading. The Government took an appeal to the Court of Appeals for the District of Columbia under the D. C. appeals statute. The appellate court certified to this Court the question whether it had jurisdiction over an appeal where a § 3731-type challenge was joined with a challenge to the sufficiency of the indictment as a pleading. The Court disposed of the question by holding that the Criminal Appeals Act is inapplicable to any criminal case appealable under the provision of the D. C. Code:

*"The Criminal Appeals Act, in naming the courts from which appeals may be taken to this court, employs the phrase 'district courts,' not 'courts of the United States,' or 'courts exercising the same jurisdiction as district courts.' We need not, however, determine whether the statute should be construed to embrace criminal cases tried in the Supreme Court of the District if § 935 of the District Code were not in effect. That section deals comprehensively with appeals in criminal cases from all*

of the courts of first instance of the District and confers on the Court of Appeals jurisdiction of appeals by the Government seeking review of the judgments of those courts. The Criminal Appeals Act, on the other hand, affects only certain specified classes of decisions in district courts, contains no repealing clause, and no reference to the courts of the District of Columbia or the territorial courts, upon many of which jurisdiction is conferred by language quite similar to that of the Code of Law of the District. We cannot construe it as impliedly repealing the complete appellate system created for the District of Columbia by § 935 of the Code, in the absence of expression on the part of Congress indicating that purpose. Implied repeals are not favored; and if effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in force . . . ." 289 U. S., at 163-164.<sup>3</sup>

The holding in *Burroughs* established a complete separation of the two statutory schemes for Government appeals in criminal cases; the essence of the Court's rationale was a presumption against implied repeals.

In 1942, Congress amended the Criminal Appeals Act to provide for Government appeals to the Courts of Appeals from all decisions dismissing indictments or arresting judgments of convictions except where a right of direct appeal to this Court exists. 56 Stat. 271. The

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<sup>3</sup> The Court's opinion characterizes *Burroughs* as having "held only that the term 'district court' in the Criminal Appeals Act did not include the then-existing Supreme Court of the District of Columbia." *Ante*, at [3]. As I read the italicized portion of the above-quoted passage, that is the precise question that the *Burroughs* Court concluded it did not have to decide, in light of its holding that the Criminal Appeals Act could not, by implication, effect the repeal of § 935 of the District Code.

new amendment expressly included the United States Court of Appeals for the District of Columbia as one of the intermediate appellate tribunals to which the Government could appeal;<sup>4</sup> in addition, the Act added a new provision to the Judicial Code establishing appellate jurisdiction in the then circuit courts of appeal "in criminal cases on appeals taken by the United States in cases where such appeals are permitted by law." 56 Stat. 272. The latter provision also expressly incorporated the United States Court of Appeals for the District of Columbia.<sup>5</sup> *Ibid.*

The legislative history of the 1942 amendment offers no explication of Congressional intent in including the D. C. courts within the Act.<sup>6</sup> It is certain that this amendment generates some form of overlap between the two statutory schemes for Governmental appeals in criminal cases. In *Carroll v. United States*, 354 U. S. 394, 411 (1957), the Court recognized the new situation created by the 1942 amendment:

"It may be concluded, then, that even today criminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U. S. C. § 3731, although as to cases of the type covered by that special jurisdictional statute, its explicit directions will prevail over the general terms of [the D. C. statute] . . . ."

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<sup>4</sup> These explicit references were subsequently omitted by amendment in 1949, 63 Stat. 97, which altered the language of the statute to conform to the changed nomenclature of the federal courts.

<sup>5</sup> This last provision was an amendment to 28 U. S. C. § 225 (1940 ed.); see 56 Stat. 272 and *Carroll v. United States*, *supra*, at n. 5.

<sup>6</sup> The focus was on the decision to accord the Government a right of appeal to the courts of appeal where no direct appeal to this Court lay. See H. R. No. 45, 77th Cong., 1st Sess. (1941); S. Rep. No. 868, 77th Cong., 1st Sess. (1941).

That, however, leaves open the question which cases come within the categories set forth in 18 U. S. C. § 3731.

### III

After this Court's holding in *Burroughs*, it was clear that if Congress wished to effectuate any displacement of the pre-1907 route for Government appeals of criminal cases within the District of Columbia, some express manifestation of its intent was required. The 1942 amendment followed the *Burroughs* decision. Since Congress then acted to create some overlap between the two statutes without further limiting the categories of directly appealable criminal cases, it may be argued that we should presume Congress intended, as of 1942, to embrace within the very special appeals procedures of 18 U. S. C. § 3731 criminal cases based upon statutes applicable only within the District.

But that presumption from a completely silent legislative record flies in the face of the principle that statutes creating a right of direct appeal to this Court should be narrowly construed. Cf. *Swift & Co. v. Wickham*, 382 U. S. 111, 128-129 (1965); *Florida Lime Growers v. Jacobsen*, 362 U. S. 73, 92-93 (Frankfurter, J., dissenting). And, in light of the legislative history of the 1907 Act and this Court's explicit holding in *Burroughs* that the 1907 Act had no impact on cases appealable under the D. C. provision, it is especially inappropriate to rely on the absence of any further limiting language in the 1942 amendment as a justification for reading the term "statute" as encompassing criminal prosecutions in the District based on local as well as nationwide statutes.

The legislative history of the 1907 Act suggests a perfectly plausible reason for interpreting the language "based upon the invalidity or construction of the statute" as excluding D. C. statutes: that language was put in the Act by Senator Clarke with the express intention of



limiting the Act's goal to remedying the precise defect of inconsistent enforcement of criminal statutes arising from the lack of a Government appeal. The Court of Appeals for the District of Columbia constitutes a perfectly adequate appellate tribunal for resolving conflicting interpretations given local statutes by judges within the District of Columbia.<sup>7</sup> Where, however, the Government brings a prosecution in the District of Columbia based on a statute of nationwide applicability, the Court of Appeals for the District of Columbia cannot achieve uniformity in the enforcement of the statute.

As an original proposition, then, a construction of the relevant provisions of the 1907 Act as excluding criminal cases in the District brought under local statutes but including cases brought under nationwide statutes would have been consistent both with the express purpose of Senator Clarke's amendment and the canon of strict construction as applied to direct appeals statutes.<sup>8</sup> But the

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<sup>7</sup> The Government suggests a construction of the Criminal Appeals Act excluding D. C. statutes would require the Court to exclude other criminal statutes of only limited territorial application, *e. g.*, 18 U. S. C. §§ 1111-1112; (punishing homicide "[w]ithin the special maritime and territorial jurisdiction of the United States"); 18 U. S. C. §§ 1151-1165 regulating offenses within Indian territory). See Gov. Brief, at 15-16. But I would not construe 18 U. S. C. § 3731 as excluding D. C. criminal cases punishable under D. C. statutes because they are of limited territorial application; rather, the point is that given the existence of a prior right of Government appeal, the risks of disuniformity which Senator Clarke described the statute as intended to cure do not exist.

<sup>8</sup> The Government suggests, in its Supplemental Memorandum for the United States, at 6-7, that a construction of the 1907 Act excluding statutes applicable only within the District of Columbia from the scope of the first two provisions leads to the "anomalous consequence" that 18 U. S. C. § 3731 would still allow a direct appeal in a D. C. case where the motion-in-bar provision is concerned. *E. g.*, *United States v. Sweet*, 399 U. S. 517 (1970). The alleged "anomaly" would seem to argue for the conclusion that D. C. cases



Court in *Burroughs* took the position that Congress could not displace the pre-existing appellate route to any extent without indicating an express intent to do so; *Burroughs*, significantly, involved a prosecution under a statute of nationwide applicability. Subsequently, Congress did expressly indicate an intent to displace the alternative appellate route available within the District. The extent of that displacement, I think, should now be measured by the express goal of the relevant provision of the 1907 Act, as limited by Senator Clarke: avoidance of inconsistent enforcement of criminal laws. That theory of legislative purpose—combined with the *Burroughs* holding that Congress should be required to affirmatively indicate an intent to displace the prior appellate route—yields an interpretation of the 1907 Act as amended in 1942 which is consistent with the canon of strict construction generally applied to direct appeals statutes.\*

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involving the motion-in-bar provision are not directly appealable here, either. Certainly, the Court's disposition in *Sweet* would not foreclose that result.

In any event, the purpose Senator Clarke had in mind in offering his limiting amendment with regard to the first two provisions of 18 U. S. C. § 3731 was rather clearly expressed; that he failed to address himself to the motion-in-bar provision—which, after all, received very little attention in the prolonged debates on the floor of the Senate—hardly justifies an expansive reading of the other provisions of the Act.

\* The Government relies principally on *Shapiro v. Thompson*, 394 U. S. 618, 625 n. 4, as supporting its construction of the generic reference to "statutes" in 18 U. S. C. § 3731 to include statutes applicable only within the District of Columbia. *Shapiro* dealt with 28 U. S. C. § 2282, which requires a three-judge court to hear requests for injunctions against the enforcement of "any Act of Congress" when the ground for the requested relief is the alleged unconstitutionality of the Act. Decisions of such three-judge courts are, under the circumstances set forth in 28 U. S. C. § 1253, directly appealable to this Court. In *Shapiro*, the Court noted at least one prior instance where the Court had taken jurisdiction over

## IV

I have little doubt that, had the Criminal Appeals Act not been recently amended to dispense with direct appeals to this Court, see n. 1 *supra*, the interpretation of the Act I have suggested would be adopted by the Court. This Court has never taken jurisdiction over a direct appeal from a dismissal of a prosecution brought in the

a case involving a statute applicable only within the District and then stated: "Section 2282 requires a three-judge court to hear a challenge to the constitutionality of 'any Act of Congress.' We see no reason to make an exception for Acts of Congress pertaining to the District of Columbia." 394 U. S., at 625 n. 4 (emphasis in original).

The *Shapiro* approach is obviously inappropriate for the present problem. First, despite the Government's assertion to the contrary, see Gov. Brief, at 15, the phrase "any Act of Congress" is arguably broader than a generic reference to "statutes." Indeed, the *Shapiro* Court explicitly chose to emphasize the presence of the word "any" in the relevant portion of that statute. Second, while an exercise of jurisdiction in a case where jurisdiction is not challenged is of little precedential value, the Court in *Shapiro* still chose to take note of such a prior case; in the present context, this Court has never taken jurisdiction of a § 3731 appeal involving a statute applicable only within the District.

Third, and most importantly, Congress at the time of the three-judge court Acts altered the principles of both original and appellate jurisdiction for the substantive categories of litigation involved; the new procedural routes reflect crucial considerations of comity between sovereigns and among the branches of the Federal Government. See generally Currie, *The Three-Judge Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1 (1964). There is no legislative history supporting the notion that the new procedures were narrowed to alleviate particular defects of inconsistent constitutional interpretation due to the absence of any appellate route for the substantive categories of cases to be included within the Act.

In these circumstances, it is fair to conclude that the principle of strict construction applicable to such statutes must yield to the "inert language" of the statute. Cf. *Florida Lime Growers v. Jacobsen*, 362 U. S. 73, 92 (1960) (Frankfurter, J., dissenting).

District of Columbia for violation of a statute applicable within the District. It is worth noting that, given the Court's adherence to the principles of *Carroll v. United States*, *supra*, the rather absurd waste of our judicial resources on cases such as *United States v. Waters*, 175 F. 2d 340, appeal dismissed on motion of the United States, 335 U. S. 869 (1948), and *United States v. Sweet*, 399 U. S. 517 (1970), see n. 7 *supra*, could not even be avoided by the exercise of governmental discretion in choosing appellate routes. In light of *Carroll*, I cannot believe that a perfectly acceptable reading of congressional purpose underpinning the definition of categories of cases directly appealable under 18 U. S. C. § 3731 which excludes statutes applicable only within the District of Columbia would have been turned down by the Court.

Of course, the recent elimination of the direct appeal route removes a great deal of the incentive to continue the stringent standards of construction with respect to this statute that have traditionally prevailed in this Court. Indeed, at this stage of the game, the canon of strict construction produces the ironic result of compelling a relatively greater expenditure of judicial energies in assessing our jurisdiction over the remainder of the criminal cases pending in the district courts of the Nation at the time of the most recent amendment than would be involved in deciding those cases on the merits. Nonetheless, this very Term we have indicated that we intend to adhere to the rules of construction evolved by this Court during the long and tortuous history of this statute. *United States v. Weller*, No. 77, October Term 1970 (decided February 24, 1971).

The only response we are offered to the reading of congressional purpose I have suggested is that the interests of avoiding inconsistent enforcement of criminal laws argues for exercising jurisdiction over this case because similar statutes in other jurisdictions are under attack

on vagueness grounds. See the Court's opinion, at [3]. Surely those of my Brethren who subscribe to the views on jurisdiction expressed in the opinion of the Court must recognize that we cannot limit the category of appealable cases under this provision of the Act to prosecutions brought under D. C. statutes which are (a) duplicated in other jurisdictions, and (b) under attack on similar federal question grounds in other jurisdictions. The proffered response is, therefore, not truly a reason for concluding we have jurisdiction over the relevant category of cases; rather, it is a reason for exercising our power in this one case to settle Dr. Vuitch's vagueness claim in spite of the absence of the jurisdictional prerequisites which legitimize the exercise of that judicial power.

## V

Having concluded that the Government cannot directly appeal the dismissal of the indictment to this Court under the provisions of 18 U. S. C. § 3731, it also follows that we cannot utilize the remand provisions of that statute to reroute the appeal to the Court of Appeals for the District of Columbia. However, we do have jurisdiction to determine our jurisdiction, and, in the analogous three-judge court situation where an alternative appellate route exists but the statute according this Court direct jurisdiction over the certain appeals includes no remand procedure, this Court has vacated the judgment of the court of original jurisdiction and remanded the case to that court for the entry of a fresh decree from which timely appeal may be taken to the proper appellate tribunal. *Rockefeller v. Catholic Medical Center of Brooklyn & Queens*, 397 U. S. 820 (1970). The instant case, of course, is a criminal prosecution, and there is a consideration not present in the three-judge court situation: i. e., the additional anxiety caused the

defendant by virtue of the Government's erroneous choice of appellate routes. But, while 18 U. S. C. § 3731 cannot empower us to transfer the case, that statute is still relevant as an expression of congressional policy to save the Government's appeal where an erroneous choice of appellate routes is made, even at the expense of additional anxiety to the defendant. Accordingly, I think the proper disposition of this case would be to vacate the judgment of the District Court and remand the case for the entry of a fresh judgment from which the Government could take a timely appeal to the Court of Appeals for the District of Columbia pursuant to 23 D. C. Code § 105.

## VI

Notwithstanding the views on jurisdiction expressed above, and speaking only for myself, and not for those of my Brethren who agree with my discussion of the jurisdictional issue in this case, I have concluded, substantially for the reasons set forth in MR. JUSTICE BLACKMUN's separate opinion, that I should also reach the merits. Accordingly, I concur in Part II of the Court's opinion and the judgment of the Court.

# SUPREME COURT OF THE UNITED STATES

No. 84.—OCTOBER TERM, 1970

United States, Appellant,		On Appeal From the United States District Court for the District of Columbia.
v.		
Milan Vuitch.		

[April 21, 1971]

MR. JUSTICE STEWART, dissenting in part.

I agree that we have jurisdiction of this appeal for the reasons stated in Part I of the Court's opinion.

As to the merits of this controversy, I share at least some of the constitutional doubts about the abortion statute expressed by the District Court. But, as this Court today correctly points out, "statutes should be construed whenever possible so as to uphold their constitutionality." The statute before us can be so construed, I think, simply by extending the reasoning of the Court's opinion to its logical conclusion.

The statute legalizes any abortion performed "under the direction of a competent licensed practitioner of medicine" if "necessary for the preservation of the mother's life or health." Under the statute, therefore, the legal practice of medicine in the District of Columbia includes the performing of abortions. For the practice of medicine consists of doing those things which, in the judgment of a physician, are necessary to preserve a patient's life or health. As the Court says, "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."

It follows, I think, that when a physician has exercised his judgment in favor of performing an abortion, he has, by hypothesis, not violated the statute. To put it an-

other way, I think the question of whether the performance of an abortion is "necessary for the mother's life or health" is entrusted under the statute exclusively to those licensed to practice medicine, without the overhanging risk of incurring criminal liability at the hands of a second-guessing lay jury. I would hold, therefore, that "a competent licensed practitioner of medicine" is wholly immune from being charged with the commission of a criminal offense under this law.

It is true that the statute can be construed in other ways, as MR. JUSTICE DOUGLAS has made clear. But I would give it the reading I have indicated "in the candid service of avoiding a serious constitutional doubt." *United States v. Rumely*, 345 U. S. 41, 47.

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MR. JUSTICE BLACKMUN.

Although I join MR. JUSTICE HARLAN in his conclusion that this case is not properly here by direct appeal under 18 U. S. C. § 3731, a majority, and thus the Court, holds otherwise. The case is therefore here and requires decision.

The five Justices constituting the majority, however, are divided on the merits. One feels that 22 D. C. Code § 201 lacks the requirements of procedural due process and would affirm the dismissal of the indictment. One would hold that a licensed physician is immune from charge under the statute. Three would hold that, properly construed, the statute is not unconstitutionally vague and that the dismissal of the indictment on that ground was error.

Because of the inability of the jurisdictional-issue majority to agree upon the disposition of the case, I feel obligated not to remain silent as to the merits. See *Screws v. United States*, 325 U. S. 91, 134 (1945) (addendum by Mr. Justice Rutledge); *United States v. Jorn*, 400 U. S. 470, 487-488 (1971) (statement of BLACK and BRENNAN, JJ.); *Mills v. Alabama*, 384 U. S. 214, 222-223 (1966) (separate opinion of HARLAN, J.); *Kesler v. Department of Public Safety*, 369 U. S. 153, 174, 179 (concurring opinion of STEWART, J., and dissenting opinion of Warren, C. J.). Assuming, as I must in the light of the Court's decision, that the Court does have jurisdiction of the appeal, I join Part II of MR. JUSTICE BLACK's opinion and the judgment of the Court.